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BY

T. T. ROLPH,

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J. F. SMITH. Q.C.,

EDITOR.

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CONTAINING THE CASES DETERMINED,
WITH A TABLE OF THE NAMES OF CASES REPORTED,
A TABLE OF THE NAMES OF CASES CITED,
A TABLE OF THE SECTIONS AND RULES OF O. J. A. AND G. O. CHY. CITED
AND A DIGEST OF THE PRINCIPAL MATTERS.

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A T A B L E

OF

SECTIONS AND RULES OF THE ONTARIO JUDICATURE ACT AND CHANCERY GENERAL ORDERS.

REFERRED TO IN THIS VOLUME.

NOTE—Where a Section, Rule, or G. O. Chy. is mentioned more than once
in the same case one reference only is given.

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ERRATA.

Page 304, line 3 of statement, after s-s. 28 insert of s. 9.

“ 337, in fifth line of head-note, Rule 255 should be 356.

“ 438, head-line, and page 439, line 5, Rule 225 should be 255.

“ 514, line 10, strike out the word “is.”

ONTARIO PRACTICE REPORTS.

CARTER V. BARKER.

Dismissing action—Want of prosecution.

If the plaintiff without good excuse neglect to proceed with the action, the Court will not, as of course, on his mere undertaking to speed the action and paying the costs, refuse to dismiss, but where defendant's solicitor had refused to accept notice of trial a few hours late, an order refusing to dismiss and permitting the plaintiff to proceed was affirmed.

[May 19, 1885.—*Rose, J.*]

AN appeal from an order of the Master-in-Chambers refusing to dismiss the action for want of prosecution, and permitting the plaintiff to proceed on payment of costs.

The pleadings were closed six weeks before the commencement of the Assizes.

The plaintiff's solicitors abstained from serving the notice of trial, waiting to hear from the plaintiff, whom they had notified that they would not proceed unless he paid certain costs owing to them.

Not having heard from him they changed their minds, and on the last day for service, about eight o'clock in the evening (service after four not being good) caused the defendant's solicitor to be communicated with, and asked him if he would accept service of the notice. This he declined to do, and afterwards made a motion before the Master-in-Chambers under Rule 255, O. J. A. to dismiss the action for want of prosecution.

The Master in the exercise of his discretion thought that the plaintiff's solicitors were sufficiently punished for their laxity by being ordered to pay the costs of the motion, and undertaking to go down to trial at the next sittings.

From this order the defendant appealed.

Aylesworth, for the appeal.

R. A. Porteous, contra.

ROSE, J.—It certainly would be very strict practice to allow the defendant's solicitor to say: I refuse to accept service of notice of trial, because you are a few hours late; and I will move to dismiss the action, because you do not proceed to trial.

I was urged to interfere, because this is a hard action. It is an action against magistrates by a convict who had been imprisoned, and who was discharged under an order made by me quashing the conviction. It was argued that I would have ordered that no action of trespass should be brought, if I had been requested to do so on the motion. I think that is probable, but I must not by a harsh order establishing a vicious practice endeavour now to do what was then left undone.

I was referred to my decision in *Napanee and Tamworth R. W. Co. v. McDonnell* (a), as laying down a strict practice as to the liability of dismissal for not proceeding with the action promptly. I am desirous of affirming the principle that if the plaintiff, without good excuse, neglect to proceed with the action the Court will not, as of course, on his mere undertaking to speed the action and paying costs, refuse to dismiss.

The facts of that case were so essentially different from the facts in this case as to afford no parallel.

I think I should have made a similar order to that of the learned Master had the motion been before me in the first instance. I certainly do not feel justified in interfering with his discretion.

Had the plaintiff's solicitors not communicated with the defendant's solicitor as to the notice of trial, I think it would have been no excuse to have said that he was awaiting funds from his client. The client would in such

(a) Now reported, 10 P. R. 525.

a case be pleading his own neglect to put his solicitors in funds in answer to his neglect to serve notice of trial.

The appeal fails, and must be dismissed, with costs in the cause to the plaintiff in any event of the cause.

ROBERTS V. LUCAS.

Order dismissing action—Rule 255, O. J. A.

An order made at Chambers under Rule 255, O. J. A., dismissing the action for want of prosecution where issue had been joined, but the case had not been set down for trial nor notice of trial given, was *Held* not a dismissal on the merits and not a bar to a subsequent action for the same cause.

[May 22, 1885.—*Rose, J.*]

THIS was an appeal from the order of the local Judge at Hamilton at Chambers, dismissing the action for want of prosecution, and refusing to insert in the order a clause reserving to the plaintiff leave to bring a fresh action.

The cause had proceeded to issue but had not been set down for trial, nor had notice of trial been given.

Holman, for appeal.

A. Bruce, contra.

ROSE, J.—Upon the opening of the argument, I suggested to counsel that a dismissal for want of prosecution at this stage was not a dismissal on the merits, and afforded no bar to a subsequent action for the same cause.

Mr. Bruce candidly admitted that both parties had come to the argument on the contrary supposition, and endeavored to support the contention that the order had the effect of a bar to any subsequent proceeding for the same cause of action. Since the argument he has referred me to *Gwynne v. McNab*, 2 Gr. 124, where the Court declined to

make any special order, and left the plaintiff to his rights whatever they were. Reference to that case shews that the Court declined to express any opinion as to the effect of such an order, as it was unnecessary so to do.

Mr. Bruce further argued that as the plaintiff was not at liberty to discontinue after joining issue upon the statement of defence without leave of the Court or a Judge, (see Rules 170 and 170 (b) O. J. A.,) and as under Rule 255 provision is made for dismissing the action for want of prosecution, such dismissal must mean something more than discontinuance.

There is no express provision stating the effect of an order to dismiss. Rule 330 provides in terms that unless otherwise directed a judgment of nonsuit shall have the same effect as a judgment upon the merits for the defendant, but the orders as to discontinuance or dismissal have no such provision.

The rules I have referred to are similar, so far as affects this question, to the English rules, and in *Re Orrell Colliery and Fire Brick Co.*, 12 Ch. D. 681, Jessel, M. R., considers their effect. He points out at p. 682 the difference between the judgment of *non-prosequitur* at Common Law and order of dismissal in Chancery. I give his words: "It is very much to be desired that a new rule should be made to meet cases of this kind. But in the meantime the former practice applies, except so far as it has been altered by the Judicature Act and the rules of Court, and I find nothing in them which varies them on this point.

"Formerly a man could abandon his action by not taking any further steps in it whether it were brought at Common Law or in Chancery. In the former case the defendant signed judgment of *non-prosequitur* which exactly described what had happened; in the latter case he would have the bill dismissed for want of prosecution; but in either case the plaintiff could bring a new action for the same matter, with this exception only, that in Chancery if the cause had been set down to be heard the dismissal of the bill for want of prosecution was equivalent to dismissal on the merits, and was a bar to a new action.

“In this case, if the action had been set down for hearing, there might have been a question whether the former rule of Common Law or that of the Court of Chancery ought to prevail. But in a case where, as here, the action had not been set down, there was only one rule, namely, that a fresh action might be brought * *”

The case is referred to in *MacLennan's* Judicature Act, 2nd ed., p. 342. See *Daniell's* Chy. Pleading and Pr., 6th ed., pp. 480 and 554.

Reference to sec. 52 of the O. J. A. will shew that the same necessity exists for a rule in Ontario as in England to settle any question that may arise as to a dismissal after a cause has been set down for hearing.

I think there was no necessity for this appeal, and that it must be dismissed, with costs in the cause to the defendant.

RE HINDS, HINDS v. HINDS.

Lunatic—Maintenance—Money in Court.

Money in Court to the credit of a lunatic, though not so found, was directed to be paid out in annual sums for his maintenance.

[March 30, 1885.—*Ferguson, J.*]

ONE Charles Hinds was entitled to certain moneys in Court to the credit of this matter, being his share of the proceeds of the sale of lands owned by his father. A petition was presented to the Court by Beaty Hinds, the brother of Charles Hinds, shewing that Charles Hinds was a lunatic, though not so found, and was living with the petitioner, and praying that an order might be made for payment out of the moneys in Court, from time to time, to the petitioner for the maintenance of his brother, the lunatic.

Holman, for the petitioner, cited *Re Bligh*, 12 Ch. D. 634; *Re Brandon* 13 Ch. D. 773; in each of which cases a similar order had been made to the one asked here, although there had been no declaration of lunacy.

John Hoskin, Q.C., official guardian *ad litem*, appeared for the lunatic.

FERGUSON, J., made an order for payment to the petitioner of the costs of the application, and of an annual allowance to be expended for the maintenance of the lunatic, out of the latter's share of the moneys in Court.

SMITH V. SMITH ET AL.

Notice of appeal—Effect of.

A notice of appeal to the Court of Appeal is not an initiation of the appeal.

Where notice was served, but the security required by sec. 38, O. J. A., was not given,

Held, that there was no appeal pending, and a motion to set aside the notice of appeal, or to dismiss the appeal, was dismissed.

[April 28, 1885.—*The Master-in-Chambers.*]

[May 4, 1885.—*Rose, J.*]

Judgment was pronounced at the trial in favour of the plaintiff, and the defendants, within one month from the judgment, filed and served a notice of their intention to prosecute an appeal to the Court of Appeal. No further step was taken by the defendants, and security for appeal was not furnished within three months from the date of the judgment as required by sec. 38, O. J. A. After the three months had expired a motion was made by the plaintiff to dismiss the appeal or set aside the notice.

F. W. Hill, for the motion.

R. A. Porteous, contra.

THE MASTER-IN-CHAMBERS, held that the notice of appeal was not an initiation of the appeal, and that therefore there was no appeal to dismiss, that the plaintiff was not in any way injured by the notice of appeal, which had not been followed by the actual initiation of an appeal; and he therefore thought the motion unnecessary, and refused it.

An appeal to ROSE, J., was dismissed with costs, the learned Judge agreeing with the Master that the motion was unnecessary.

ROSENHEIM V. SILLIMAN.

Examination before trial—Witness—Rule 285.

A clerk in a Toronto warehouse accepted a bill of exchange on behalf of his employer, who resided in Philadelphia, U. S. A. In an action on the bill the employer denied the authority of his clerk to accept.

Held, that the clerk could not be examined under Rule 285, O. J. A. *Semble*, neither could the Toronto manager of the business be examined under the Rule.

[April 18, 1885.—*The Master-in-Chambers.*]

[May 19, 1885.—*Rose, J.*]

AN action on a bill of exchange. The defendant lived in Philadelphia, U. S. A., but carried on business in Toronto, as a wholesale dealer in fancy goods, and the bill was accepted in his name by one Langley, a clerk in his Toronto warehouse.

The defence denied that Langley had authority to accept the draft.

Holman, for the plaintiff, moved under Rule 285, O. J. A., for an order to examine before the trial the manager of the defendant's Toronto business and also Langley, the clerk who accepted the bill in the defendant's name.

Ogden, for the defendant, opposed the motion, citing *Carnegie v. Federal Bank*, 10 P. R. 69.

THE MASTER-IN-CHAMBERS.—I make the order for the examination of both these persons. I am induced to do so chiefly by the circumstance that the defendant lives out of the jurisdiction. So far as I know, this is the first application of the kind.

The defendant appealed to a Judge in Chambers from so much of the Master's order as directed the examination of Langley.

The appeal was argued by the same counsel.

ROSE, J.—The defendant appeals from an order of the learned Master, directing the examination under rule 285, O. J. A., of one Langley, an employee of the defendant, and by whom the draft in question is said to have been accepted for the defendant.

The defendant denies that Langley had any authority to accept the draft in his name, and contends that such acceptance is not binding upon him.

The ground upon which the order was asked was, that the defendant is a resident of Philadelphia, out of the jurisdiction of the Court, and cannot be examined "without issuing a commission."

Mere convenience was held, in *Carnegie v. Federal Bank* 10 P. R. 69, not to be a ground for granting an order under this rule.

A commission is not necessary. An order to examine may be taken out, and if the defendant do not attend his defence may be struck out. See 41 Vic. ch. 8, sec. 9 (O.)

There would be no necessity of a solicitor from this Province attending, and the expense would not be burdensome.

It seems somewhat hard upon the defendant to allow his employee to be examined so as to bind him by his evidence, when the very question in dispute is the alleged wrongful act of such employee.

If there is power to make the order, there is power to direct the deposition to be filed and given in evidence.

On the argument I doubted if this was a case within the rule, and reserved judgment to give the matter full consideration.

I have also availed myself of the privilege of consultation, and feel quite convinced that the rule was not intended to cover such a case.

With great respect for the opinion of the learned Master I feel unable to come to the same conclusion as that at which he arrived, and must allow the appeal, with costs in the cause to the defendant in any event.

As the defendant has not appealed from so much of the order as directed the examination of the manager it is unnecessary to express any opinion as to the right to make such order. Unless some reason can be suggested which does not occur to me at present, I would think it open to the same objections.

HATELY V. THE MERCHANTS' DESPATCH TRANSPORTATION COMPANY ET AL.

*Security for costs—Delivery out of bond to the bondsman—Case in the
Court of Appeal.*

The plaintiff, who lived out of the jurisdiction, obtained a judgment at the trial which was affirmed by the Divisional Court, except as to one defendant against whom the action was dismissed, without costs. *Held*, pending an appeal to the Court of Appeal by the other defendants, that the plaintiff was entitled to have his bond for security for costs taken off the files and delivered up to be cancelled.

[March 8, 1884.—*The Queen's Bench Division.*]

AN action against three carrier companies for damages to goods in transit shipped by the plaintiff.

When the action was commenced the plaintiff resided within the jurisdiction of the Court, but while it was proceeding, and after a large amount of costs had been

incurred, the plaintiff removed with all his effects to the United States. An order was then made for security for costs, and the plaintiff gave the usual bond.

The plaintiff obtained judgment at the trial against all three defendants, and upon a motion by two of the defendants to the Queen's Bench Division this judgment was affirmed as against the defendants the G. W. Steamship Co., but as against the defendants the Grand Trunk R. W. Co., the judgment at the trial was reversed, and the action dismissed as against them without costs. The defendants the Merchants' Despatch Transportation Company did not move in the Queen's Bench Division, but at once gave notice of appeal to the Court of Appeal from the judgment at the trial. The defendants the G. W. Steamship Co. also appealed from the judgment of the Queen's Bench Division.

After the confirmation of the judgment by the Queen's Bench Division, the case then being at an end as far as the High Court was concerned, and the plaintiff having succeeded against two of the defendants and having had his action dismissed against the third defendant without costs, a motion was made on behalf of the plaintiff for leave to remove the bond filed for security for costs and to have the same cancelled.

Aylesworth and *Lees*, for the motion. The bond was given as security for the defendants' costs of the action. The action is now at an end, and no costs have been awarded to any of the defendants. The event for which the bond was conditioned has not happened and it should therefore be delivered up to be cancelled. In *Morton v. G. T. R. Co.*, (not reported upon this point,) under similar circumstances, *Armour, J.*, in June, 1883, ordered money paid into Court by the plaintiff as security for costs to be paid out of Court to him, and the Queen's Bench Divisional Court on appeal affirmed the order of *Armour, J.*

Plumb and *Millar*, contra. The bond was given to secure to the defendants all such costs as the Court should think fit to award them. The judgment is now in favour

of the plaintiff, but an appeal therefrom to the Court of Appeal is pending. By section 31 of the Court of Appeal Act, R. S. O., ch. 38, an appeal is declared to be a step in the cause; the action is therefore not at an end, inasmuch as the Court of Appeal may reverse the decision of this Court and may direct the plaintiff to pay costs.

National Insurance Co. v. Eagleson, 9 P. R. 202, and *Napier v. Hughes*, 9 P. R. 164, were referred to.

THE COURT made an order vacating the order for security for costs, and directing that the bond should be delivered out of Court to the plaintiff to be cancelled, and that the sureties should be relieved from all liability thereunder.

EXCHANGE BANK V. BARNES.

Security for costs—Case in Court of Appeal.

The plaintiffs having recovered judgment in the action, the defendant appealed to the Court of Appeal, and then moved to compel the plaintiffs to give security for costs, on the ground that they resided out of the jurisdiction, and had since the recovery of judgment ceased to carry on business in this Province, and withdrawn their assets therefrom. The motion was refused.

[December 19, 1884.—*Osler*, J. A.]

A MOTION by the defendant for security for costs, under the circumstances set forth in the judgment. The motion was made before a Judge of the Court of Appeal in Chambers, the defendant having carried the case to that Court.

R. Martin, Q.C., for the motion.

Laidlaw, contra.

OSLER, J. A.—This is a motion by the defendant to compel the plaintiff to give security for costs under very unusual circumstances.

The plaintiffs have recovered judgment in the action, but the defendant has appealed.

Since the recovery of judgment the plaintiffs have ceased to carry on business in the Province, and have withdrawn all their assets to the Province of Quebec, in which their head office is or was, and where therefore as a corporation they reside.

The defendant argues that as an appeal is only a step in the cause, and security may be obtained for past and future costs at any stage of the cause where circumstances occur to justify it, security for costs should now be ordered notwithstanding that judgment has been recovered against him.

Even if I was not bound by authority I should be of opinion that it would be an improper exercise of discretion to order security at this stage of the cause. I have no right to assume, for that purpose, that the judgment may be reversed; and moreover even if the appeal is merely a step in the cause the position of the parties is reversed, the defendant has become the *actor*, and there is no greater reason for the plaintiff giving security at that stage than for the defendant doing so when the action was begun.

However, as I said, the question is really covered by authority, as I am bound to follow the decision of the Queen's Bench Division in *Hately v. Merchants Despatch Co.*, 8th March, 1884 (*a*). In that case the plaintiff resided out of the jurisdiction, and had been ordered to give security for costs. He recovered judgment in the action, and then moved that the bond for security might be given up to be cancelled. The motion was opposed on the ground that an appeal from the judgment had been set down for hearing, but the Court notwithstanding made the order. The

(*a*) Now reported, *ante* p. 9.

defendants there stood in a much better position than the defendant does in this case, as security had actually been given, and he only wanted things to remain in *statu quo* until the appeal was disposed of. I do not say that that should make any difference, but if the security was discharged in that case, *a fortiori* I should not order it to be given in this. So the motion is refused, with costs.

COTTINGHAM ET AL. V. COTTINGHAM.

Infant—Next friend—Appeal—Indemnity against costs.

An order was made indemnifying the next friend of the infant plaintiffs out of their money for the costs of an appeal to the Supreme Court of Canada, where the appeal was advised by more than one counsel, and one of the Judges of the Court of Appeal had dissented from the rest.

[May 13, 1885.—*Ferguson, J.*]

Watson, for the infant plaintiffs, and their next friend, moved *ex parte* for an order authorizing the next friend to prosecute an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, and protecting the next friend out of the infants' money in Court in respect of the costs of the appeal.

FERGUSON, J.—The infants have a large fund in Court. The judgment in this action is against their interests. The amount involved in the action is the value of over twenty-four acres of land, which is at least, as I gather, worth \$31 per acre, (it is said that it is now worth much more,) and a large sum of costs.

The next friend of the infants comes before the Court, and says that he is dissatisfied with the decision, and that he has had the opinion of counsel (more than one) to the effect that the action should be appealed to the Supreme

Court. One of the learned Judges of the Court of Appeal dissented from the opinion of the others. Under these circumstances I am asked to make an order to the effect that if the *prochein amy*, or next friend, institute and prosecute such an appeal he shall be indemnified out of the infants' money, in case such indemnity become necessary, &c., &c.

At first I did not see clearly my way to making such an order, the next friend being a person who acted voluntarily, and undertook the conduct of the suit, but, upon reflection, I think that under the circumstances such an order should be made. It is a matter in which the infants' estate—part of it—according to the view of the next friend, and the opinion of the counsel who advise him, is being taken from them,

The question really is: should, under these circumstances, other estate of the infants be applied, if necessary, to bear the expense of such an appeal, and the next friend be indemnified or recouped, in case he should make advances for the purposes of the appeal. I think the order should be made. The proper order can be settled. I need not delay to state all its terms now.

HERRING V. BROOKS.

Action in Chancery Division—Jury notice—Transferring action.

In an action for the price of goods sold and delivered, which was begun in the Chancery Division, the defendant's jury notice, which had been struck out, was restored, and the action was transferred to the Queen's Bench Division.

Masse v. Masse, 10 P. R. 574, not followed, owing to the judgment of the Court of Appeal in *Pawson v. The Merchants Bank*, not yet reported.

[May 13, 1885.—*Ferguson, J.*]

Watson, for the defendant, appealed from the order of the Master in Chambers, striking out the jury notice given by the defendant. The action was for the price of goods sold, and was begun in the Chancery Division, the writ issuing from that Division in regular course under Rule 545, O. J. A.

W. A. Reeve, for the plaintiff, admitted that the action was one which could have been brought in a Common Law Court before the Judicature Act, but relied upon the decision of *Boyd C.*, in *Masse v. Masse*, 10 P. R. 574.

Watson in reply, referred to the case of *Pawson v. The Merchants Bank* (a) standing for judgment before the Court of Appeal.

FERGUSON, J.—(After reserving judgment till the decision of the Court of Appeal was given); The case of *Pawson v. The Merchants Bank*, decided yesterday in the Court of Appeal, seems to me to be decisive of the question in this appeal. The case, which, as I am informed, the learned Master followed in giving his judgment has been seriously affected by *Pawson v. The Merchants Bank*, and had this latter case been before him it is more than probable that his decision would have been different. The jury notice should, I think, be restored. It was admitted that there are no equitable issues, and that the case is simply a Common Law action, brought in the Chancery Division. The case should, I think, be transferred to the Queen's Bench Division of the Court. No costs under the circumstances.

(a) Not yet reported.

McCALLUM v. McCALLUM.

Interlocutory judgment—Irregularity—Claim for injunction—Rule 75.

The endorsement on the writ of summons claimed, in addition to pecuniary damages, an injunction restraining the defendants from disposing of certain goods.

Held, that interlocutory judgment signed by the plaintiff for default of appearance was irregular, and should be set aside.

[May 27, 1885.—*The Master-in-Chambers.*]

THE writ of summons in the action was endorsed as follows:

“The plaintiff’s claim is for damages for wrongfully depriving plaintiff of certain goods, farm stock and chattels, and converting the same to his own use—\$1,000; and for an injunction restraining the defendant from in any way disposing of or interfering with the estate or effects of the said plaintiff and the late John McCallum, deceased, or any part thereof; and also restraining the defendant from parting with, or in any way disposing of a certain promissory note made by the plaintiff to the defendant, dated 13th March, 1885, for \$500.”

Immediately after the issue of the writ a motion was made for an injunction, and by reason of counsel appearing on that motion for the defendant, the plaintiff was aware of the names of the solicitors who were defending the action.

No appearance having been entered to the writ of summons within the time limited, the plaintiff signed interlocutory judgment, and served a notice of assessment of damages on the defendant personally.

Holman, for the defendant, now moved to set aside the judgment and notice.

Hoyles, shewed cause.

THE MASTER-IN-CHAMBERS.—As to the service of notice of assessment, if that were the only question I should treat it as well enough, for it came in due time to the

hands of the solicitor. An appearance was in practice necessary it seems to me, but the service under the circumstances here should have been on the solicitor. But there is a question prior to that. Is this a case where a plaintiff may sign interlocutory judgment, and so take down the case for assessment? I think not. His right must depend on Rule 75, O. J. A. There is more sought here than pecuniary damages and a remedy for the detention of goods. The plaintiff seeks an injunction restraining the defendant from in any way disposing of or interfering with the estate or effects of the plaintiff, and the late John McCallum, deceased, or any part thereof, and also restraining the defendant from parting with, or in any way disposing of, a certain promissory note made by the plaintiff to defendant, dated 13th March, 1885, for \$500.

All this requires a statement of claim, (see *Yeatman v. Snow*, 42 L. T. N. S. 502,) and in the absence of defence a motion for judgment.

The thing is, what is best to be done under all the circumstances? The parties are willing to go down.

The judgment must be set aside. The plaintiff to file a statement of claim forthwith, and the defendant a defence by noon of the day following, and the cause to be tried at the next sittings.

PAWSON ET AL. V. THE MERCHANTS' BANK ET AL.

*Production of documents—Material on motion for better production—
Privilege.*

Upon a motion for a better affidavit of documents from the defendants, the Merchants' Bank, the plaintiffs were allowed to read the depositions of an officer of the bank, taken for use upon a previous motion in the action.

G. was general solicitor for the Bank, and was actively engaged in negotiating the transaction impeached in the action, not only on behalf of the Bank but on behalf of himself and of other persons.

Held, that letters written to the Bank by G. in reference to the transaction in question were not privileged from production.

[May 26, 1885.—*Boyd*, C.]

THIS action was brought to set aside a transfer of certain promissory notes, made by one Struthers, from the defendants Watson and Young to their co-defendants, as fraudulent and void as against the plaintiffs and the other creditors of Watson & Young.

Upon the examination of J. H. Plummer, the assistant general manager of the defendants the Merchants' Bank, on an injunction motion, it was admitted that letters relating to the matters in question from Mr. Gibbons, a solicitor, were in the possession of the Bank, but production of these was refused on the ground of privilege. Mr. Gibbons was general solicitor of the Bank, but in this transaction was also solicitor for Watson & Young and Struthers, and had himself agreed to endorse the notes in question.

The usual order to produce was issued, and an affidavit made by W. F. Harper, the manager of the Merchants' Bank at London, mentioning six letters as having been written by Mr. Gibbons to the bank.

The plaintiffs obtained from the Master in Chambers on the 9th of May, 1885, an order that the letters referred to in the examination of Plummer should be produced notwithstanding the claim of privilege.

The defendants then filed an affidavit by Harper, in which two of the letters mentioned in his former affidavit

as written by Mr. Gibbons were produced, which letters Harper said were the letters referred to by Plummer ; and he reiterated the claim of privilege as to the remaining four, saying that these were not referred to by Plummer in his examination.

The plaintiffs then moved to strike out the defence of the defendants, the Bank, on the ground [that the order of the 9th May had not been complied with, and that the two letters which had been produced disclosed the existence of others not previously mentioned.

The Master-in-Chambers made an order for production of these letters, following *Follett v. Jefferyes* 1 Sim. (N.S.) 1 ; and *Queen v. Cox*, 14 Q. B. D. 153.

From this order the defendants, the Bank, appealed.

Moss, Q.C., and *Hoyles*, for the appeal. The examination of Plummer cannot be looked at on this application ; the affidavit is conclusive, *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556 ; *Moxley v. Canada Atlantic Ry.*, 10 P. R. 553. [BOYD, C.—I do not think I can give effect to this contention. The English decisions are not applicable here, owing to the difference in the practice. There examination upon an affidavit on production is not allowed. Here in the case of a corporation the officer making the affidavit can be examined.] The communications are privileged. Fraud is not charged against the solicitor. The fraud charged is not connected with the discovery sought. *Reynell v. Speye*, 10 Beav. 51 ; *Charleton v. Coombes*, 32 L.J. (Ch.) 284 ; *Mornington v. Mornington* 2 J. & H. 697.

Shepley, for the plaintiffs, contra. The question of privilege where fraud is charged is one for the discretion of the Court. *Regina v. Cox*, 14 Q. B. D. 153, lays down the rules by which that discretion ought to be exercised. In this case, following that rule, it is sufficiently shewn by the documents already produced that it is probable that there was an intention to prefer, and the fraud charged is sufficiently connected by the documentary evidence with

the correspondence in question. Besides, Mr. Gibbons was not acting only in the capacity of solicitor for the Bank, but was also solicitor for Watson & Young and Struthers, and was himself a party to the transactions impeached, having agreed to endorse the notes, and the privilege does not therefore arise at all. *Gresley v. Mousley*, 2 K. & J. 288, decides that the allegations in the bill must be assumed to be true on a motion of this nature. It is not necessary that the solicitor should be a party to the fraud charged. *Regina v. Cox* expressly decides this. The cases *Charleton v. Coombes* and *Mornington v. Mornington* are referred to in *Regina v. Cox*, and are held not to apply to the case of a guilty client consulting an innocent solicitor. Plummer in his examination speaks of the letters written by Gibbons in one category, and claims privilege for all alike; and it is not satisfactory for another officer to select two of these letters and say that they are the only ones referred to by Plummer. The order of the 9th of May has never been appealed from, and the production of these two letters is an evasive compliance with it.

BOYD, C.—It is difficult to draw the line as to any privilege attaching to the letters now under consideration in this appeal. They form members of a series, some of which relating to the Bank's claim against Watson & Co. are produced. The solicitor appears to have been acting for others than the Bank, and to have intervened generally in the negotiations and arrangements in the sale which is attacked, and in arranging for what is referred to as the protecting of the Bank. He appears to have had interviews with all the actors, as he refers to what he has accomplished with Watson, Young & Co., Boyd Bros., and Struthers, whose purchase notes he endorsed. It is not satisfactory to have the letters referred to in Mr. Plummer's examination, and which he evidently regarded in the same category as privileged (because coming from Mr. Gibbons), defined by Mr. Harper, and after all had been ordered to be produced by order of 9th May, to have only two so produced, and the

other four protected as privileged. I would infer that they all relate to the same matters, and should be all produced.

In *Flight v. Robinson*, 8 Beav., at p. 36, Lord Langdale said: "An innocent man falsely accused of fraud will scarcely be desirous of concealing the facts which he may have stated to his legal adviser for the purpose of obtaining legal protection, to which he is justly entitled. A man engaged in a scheme of fraud will be very unwilling to disclose the statement of facts which he may have made to his legal adviser for the purpose of better enabling him to conceal or to secure and enjoy the fruits of his fraud."

I am not to let such considerations as these weigh if by the practice the letters are privileged. But it is evident that the letters were written by one who was not merely the solicitor of the Bank, nor by one who was giving purely and simply professional advice, but by one who was negotiating actively much of the whole transaction which is now impeached.

Having regard to the decision in *Regina v. Cox*, 14 Q. B. D. 153, and the language of Stephen, J., at pp. 175-6, as to the discretion which is to be exercised in determining in each particular case whether the claim of privilege should prevail or not, I am not able in the present case to persuade myself that the Master exercised an unjustifiable discretion in ordering further production, and I affirm his order with costs to the plaintiff.

I may add that *Phillips v. Holmer*, 15 W. R. 578, is an authority which goes beyond what is required to support the order in this case.

WOODRUFF V. McLENNAN.

Judgment under Rule 80, O. J. A.—Delivery of statement of claim.

The practice of moving under Rule 80, O. J. A., for leave to enter final judgment after delivery of a statement of claim is not one to be encouraged, although in cases of necessity it may be allowable. Under the circumstances of this case, motion for judgment was refused.

[June 1, 1885.—*Rose, J.*]

THIS was an appeal from an order of the Master-in-Chambers, refusing judgment under rule 80, O. J. A. The action was on a foreign judgment.

Masten, for appeal.

Holman, contra.

ROSE, J.—Mr. Holman supported the order on two grounds : 1. Defective material. 2. That the plaintiff on the same day as he served notice of motion, filed his statement of claim, citing *Stewartstown Loan Co. v. Daly*, 12 I. R. C. L. 418.

I need not consider the first ground, as on the second I think the appeal must be dismissed.

The case cited is a decision in point. Palles, C. B., in giving judgment said that his decision rested “upon the fact that the plaintiff served notice in lieu of statement of claim, and *thus took a step* to have the case tried by a jury.”

This decision is in the Ex. Div., and the Court declined to follow *Sketchley v. Corrigan*, 12 Ir. L. T. R. 50.

It may be a question how far I am bound to follow a decision of the Irish Court, especially on a point of practice, but I do not think this is a case in which I need consider the extent of my powers.

It was stated at the bar, that in this Province, where it was impossible for want of time to make a similar motion, await its result, and then get down to the approaching sittings of the Court for trials, it was the practice to serve the notice of motion, and then to file the statement of claim. If the motion was successful no costs were allowed for the

statement, and if not successful the plaintiff was not thrown over the sittings. In some cases this may not be an inconvenient practice, and I do not desire to express an opinion that it should never be followed, but a very clear case of necessity must be made to support it. I do not think such a case has been made here.

Both notice of motion and statement of claim were of date the 13th of May, instant. The sittings to which the plaintiff says he was desirous of proceeding, are the June Sittings for Toronto. The Divisional Courts commenced their sittings on the 18th of May. The profession of course know that these sittings are continued for three weeks, and hence that the June sittings could not commence before the 8th of June. This gave the plaintiff twenty-five days from the 13th of May to the 8th of June, whereas only eighteen days were required after service of statement of claim. The plaintiff had therefore ample time within which to serve notice of motion, which was returnable on the 16th, and upon its return, if the defendant desired an enlargement which would have left the plaintiff less than eighteen days, the learned Master could have imposed terms so as to have protected the plaintiff, if it had appeared just to do so.

The defendant in this case filed a statement of defence on the 15th, possibly to make it appear to the Master on the return of the motion that the pleadings were very far advanced.

If I had felt it just to grant the plaintiff an order for judgment, I should have imposed upon him the costs of the statement of defence, and no doubt the learned Master would have imposed similar terms. It will thus be seen that a plaintiff runs the risk of much costs in taking such a proceeding, and as pointed out by the Chief Baron in the above cited case, the order in question was passed so as to have matters cheaply and expeditiously decided. It therefore follows that while it may in some extreme cases be allowable, such a practice is not to be encouraged.

The appeal must be dismissed, costs in the cause to the defendant in any event.

SMITH ET AL. V. GOLDIE ET AL.

Patent action--Measure of damages--Form of judgment--Pleadings.

In a patent action the judgment of the Supreme Court of Canada declared that the plaintiffs were entitled to an enquiry and to be paid the amount found due upon such inquiry for damages sustained from the making, constructing, using, selling, or vending to others to be used, by the defendants, *and by the persons to whom they have sold, given, or let the same of any of the machines, &c.*

The judgment gave relief beyond what the plaintiffs asked by their bill of complaint.

Held, that where the language of the decree is unambiguous, the allegations in the pleadings should not be taken into account in the enquiry as to damages, and therefore the Master was wrong in excluding evidence of damages to the plaintiffs by the use of machines by persons who had bought them from the defendants.

[January 12, 1885.—*The Master-in-Ordinary.*]

[June 3, 1885.—*Proudfoot, J.*]

THIS was a reference under a judgment of the Supreme Court of Canada, directing an inquiry as to the damages sustained by the plaintiffs by reason of the defendants making, constructing, using, selling, or vending to others to be used their patented machine; and also as to the profits received by the defendants by the making, constructing, using, and vending to others to be used the said, or any machine infringing the plaintiffs' said patent.

Howland, for the plaintiffs.

Cassels, Q.C., for the defendants.

MR. HODGINS, Q. C., MASTER-IN-ORDINARY.—The plaintiffs, in their bill (paragraph 4), allege that the patentee Smith, on April 17th, 1878, assigned one-half of his patent to his co-plaintiff Knickerbocker, and that they are now the joint owners of the said patent, with the exclusive right of making, constructing, and vending to others to be used the patented machines described in the pleadings.

They also allege (paragraph 5) that in December, 1878, these two plaintiffs granted to the other plaintiffs the exclusive right to make, use, and vend to others to be used,

the said patented machine, for a term of years, in consideration of a certain royalty.

And in the sixth and seventh paragraphs they allege that certain of these latter plaintiffs, under the subsequent and and similar grants of license manufactured, used, and sold to others to be used, this patented machine.

The 28th section of the Patent Act, 35 Vic. ch. 26, requires every patentee or his assignee to commence and continuously carry on in Canada, within two years from the date of the patent, the construction or manufacture of the invention in such manner that any person desiring to use it may obtain it, or cause it be made for him at a "reasonable price."

Consistently with this provision of the Act must be read the plaintiffs' pleading, viz., that within two years of the issue of the patent in 1873, these plaintiffs commenced and continuously carried on the manufacture of this patented machine in Canada, and sold it to the public at a reasonable price.

The defendants contend that the measure of damages and account of profits which the judgment gives the plaintiffs should be based on the prices charged by the plaintiffs for the royalty, or the "reasonable price" charged by them for the machine.

I think the cases support the defendant's contention.

The patentee in selling the right to manufacture for a royalty has furnished a means of ascertaining the damages to which he is entitled. The case of *Seymour v. McCormack*, 16 How. 480, shows that where the sale of royalties by a patentee had been sufficient to establish the price of such royalties, that price should be taken as the measure of damages against the infringer. See also, *Philip v. Kock*, 17 Wall. 560; *Penn v. Jack*, L. R. 5 Eq. 81; *Packet Co. v. Sickles*, 19 Wall. 611.

Then with respect to the profits lost to the patentee, it is clear that actual damages must be proved. The question in each case of infringement is not what speculatively he may have lost, but what actually he did lose. And

this must be determined by the average rate of profit which the patentee has made on the articles manufactured and sold at the "reasonable price" mentioned in the Act.

The pleadings show that the plaintiffs have fixed a royalty for the license to manufacture; and that they have manufactured and sold this patented invention to others. Unless they have the right to negative their pleading in taking the account; or unless they can show by evidence or otherwise that the rules of law as to the measure of damages and account of profits to which I have referred are not applicable to the case of their patented machine, I must hold that having regard to the allegations in their pleadings and the provisions of the statute, and the cases which appear to give the truest definitions of a patentee's rights in those respects, the reasonable or customary price per machine charged by them for royalties, and the average profit per machine on the sales heretofore made by them, are the proper and just measures of damages and profits to which these plaintiffs are entitled under the judgment in this case.

It may be noticed that the patent laws of the United States provide that a patentee shall be entitled to recover against an infringer "in addition to the *profits* to be accounted for by the defendant, the *damages* the complainant has sustained" by reason of the infringement.

The Canadian Patent Act, s. 23, provides for the recovery of "damages" only for the infringement.

The judgment in this case follows the American rather than the Canadian Statute; but it may be taken to be the judicial interpretation of the term "damages" in the Canadian Patent Act.

On appeal, argued by the same counsel,

PROUDFOOT, J.—This action is brought by the patentees and licensees, against the manufacturers of a patented article.

The decree of the Supreme Court declared "that the plaintiffs are entitled to have the defendants discover upon

oath all machines in their possession, or made, used, or sold by or for them, or either of them, containing the combination thereinbefore set forth, in infringement of the plaintiffs' patent, and of the amounts received therefor, and of the costs thereof, and of the names of the purchasers thereof, and that the plaintiffs are entitled to an inquiry, and to be paid the amount found due upon such inquiry, for damages sustained by the plaintiffs, or any of them, from the making, constructing, using, selling or vending to others to be used, by the defendants, or any of them, *and by the persons to whom they have sold, given, or let the same* of any of the machines containing the combination hereinbefore set forth in infringement of the said patent of the plaintiff, Geo. Thos. Smith, since the filing of the plaintiffs' said bill of complaint, and for six years previously, and also the amount of the profits received by the defendants from the making, constructing, using and vending to others to be used, the said or any machine infringing the plaintiffs' said patent."

The decree gives the plaintiffs not only damages sustained by them from the manufacture sale and use of the patented machine, but also an account of the profits received by the defendants from the manufacture and sale of the machine. But Mr. Howland for the plaintiffs asked for damages only.

The decree also gives what seems to me to be a very unusual kind of relief against the manufacturers by making them liable, not only for damages caused to the plaintiffs by the manufacture and sale, but also by the user of the machine, by the persons to whom they sold. It goes much beyond what the plaintiffs asked by their Bill of Complaint, and appears to me to be without precedent. There does not seem anything in the judgments given by the Judges in the Supreme Court to warrant a decree in this form. The Chief Justice says nothing as to the form of the decree. Mr. Justice Henry says: "The infringement is admitted by the respondents, and having dealt with the case, as presented at the argument before us, I have only to express my opinion that the appeal should be allowed, with costs, *and*

the necessary decree ordered for the plaintiffs on the bill filed by them." Fournier and Taschereau, JJ., concur in the judgment of Henry J. Gwynne, J., says the appeal should be allowed, and a decree entered for the plaintiffs.

In proceeding with the reference before the Master, he gave a certificate at the joint request of the solicitors for the plaintiffs and the defendants, that after certain evidence had been received and before the plaintiffs' evidence was closed, and after hearing argument of counsel he ruled that having regard to the allegations in the plaintiffs' Bill of Complaint and the provisions of sec. 28 of the Patent Act, 35, Vic. ch. 26, (D.) the measure of damage and account of profits to which the plaintiffs are entitled as against the defendants under the judgment, should be based upon the reasonable price per machine heretofore charged by the plaintiffs, as and for a royalty, and the average profit per machine heretofore made by the plaintiffs on sales of their patented invention, subject however, to any right the plaintiffs may have (1) to negative their said pleading, and (2) to show by evidence or otherwise that his said ruling as to the measure of damages and account of profits is not applicable to the case of their patent machine.

The plaintiffs appeal from this certificate because the ruling was premature, hypothetical, and indefinite, and calculated to prejudice and embarrass the further conduct of the reference, and that inasmuch as the ruling tends to exclude, or to embarrass the plaintiffs in giving evidence of damages to the plaintiffs by the use of infringing machines, by persons to whom the defendants have sold, given or let the same.

As this question must be decided by the terms of the decree itself without reference to the pleadings, I am unwillingly constrained to give effect to the plaintiffs' contention and to allow the appeal. The ruling of the master would exclude evidence of damages to the plaintiffs by the use of infringing machines by persons who have bought them from the defendants.

No case was cited, nor have I found any, in which this extreme relief was given against the manufacturer of a patented article. And I am at a loss to conceive upon what principle it can be based. Damages in patent actions are actual damages, not imaginary or vindictive damages. The damage done by the manufacturer was complete when the machine was manufactured and sold. From that time he lost control of it, and it was immaterial to him whether it was used or not. Any damage arising from the user after the sale, was done by the purchaser, and for that *he* is responsible. If the manufacturers had themselves used the machines it might have been otherwise. The usual mode of getting damages against maker and user is exemplified in the cases of *Penn v. Bibby*, *Penn v. Jack*, and *Penn v. Fernie*, L. R. 3 Eq. 308. Mr. Jack was the manufacturer, an account was asked against him; an enquiry as to damages was asked against Bibby and Fernie, who were users. And these were the kinds of relief the judge thought the plaintiff entitled to. Mr. Curtis, in his work on Patents, s. 338, says, that in estimating the actual damages, the rule is, in cases of infringement by an actual use of the plaintiff's invention, as by making and using a patented machine, to give the value of such use during the time of the illegal user, that is to say, the amount of profits actually received by the defendant, but not the profits which he might have made by reasonable diligence. If that be the correct rule where the manufacturer has used the article, it would seem to exonerate the manufacturer when he never used the machine at all. Not using it he could make no profit from the user, and he is not liable for what he might have made by retaining it in his own possession.

I cannot find from their judgments that the Justices of the Supreme Court intended to make a decree in this form, and it may be there is no remedy, but while the decree stands it must be obeyed.

As the rule adopted by the Master in estimating the damages to which the plaintiffs are entitled as against the

manufacturers, is based in part upon allegations contained in the plaintiffs' bill, matters which I think are not to be taken into account where the language of the decree is unambiguous, it must be set aside. I do not determine on this occasion what is the true rule, nor what influence the royalty, or sum in place of a royalty, should have in estimating the damages. Many cases on this subject are collected in *Lawson on Patents*, 124 *et seq.*

Appeal allowed, with costs.

THE BANK OF BRITISH NORTH AMERICA V. THE WESTERN
ASSURANCE COMPANY.

Counsel fees—Powers of local taxing officers—Administration of Justice Act, 1885.

The *Administration of Justice Act, 1885*, has not conferred upon local Registrars of the High Court the power of taxing counsel fees of any greater amount than is allowed by the tariff of costs in force.

[June 8, 1885.—*Boyd, C.*]

AN appeal by the defendants from the taxation of the plaintiffs' costs by the Local Registrar of the High Court at Brantford.

The defendant's contention was, that the local officer had no power to tax counsel fees with brief at trial of a greater amount than is allowed by item 64 of the tariff of costs authorized by the Supreme Court of Judicature for Ontario on the 10th September, 1885, notwithstanding 48 Vic., ch. 13, sec. 22 (O.)

It appeared that there had been two adjournments of the trial, and that the officer had taxed counsel fees amounting in the aggregate to \$680.

G. Tate Blackstock, for the appeal. The question is, whether 48 Vic. ch. 13, sec. 22 (O.) enables local officers to tax costs without regard to the tariff in force. Item 64 of

the tariff limits the amount taxable by local officers as fee with brief at trial, to \$20 for senior and \$10 for junior counsel, subject to be increased by the taxing officer in Toronto. No doubt it was intended by the Act that local officers should have the same powers and discretion as the Toronto officers, but the Act has not accomplished this in respect of counsel fees; what the Act has done is to dispense with revisions.

Holman, contra. Sec. 22 of the Act says that local officers shall be entitled to tax all bills of costs, including counsel fees. The plain meaning of this is, having regard to the fact that such officers had before the Act power to tax counsel fees to a limited amount, that they now have full discretion in regard to counsel fees.

BOYD, C.—The taxing officers at Toronto have the privilege of consultation with the Judges, and for that reason are better able than local officers to say what counsel fees should be allowed in special cases. I must hold that the section of the Act quoted does not give local officers the power claimed for them, having regard to item 64 of the tariff. The items of the bill in question in this appeal may be referred to one of the taxing officers at Toronto.

DARLING V. THE MIDLAND RAILWAY COMPANY.

*Expropriation of lands by Railway—Appeal from award—Procedure—
Ontario and Dominion Railway Acts.*

Certain land was expropriated by the defendants in 1876, and proceedings to obtain compensation therefor were begun in 1884. On the 25th May, 1883, the defendants' railway became by Statute a Dominion (having previously been an Ontario) road.

Held, that the procedure provided by the Dominion Consolidated Railway Act, 1879, applied to the proceedings, and therefore that an appeal under the provisions of the Revised Ontario Railway Act could not be prosecuted,

[June 11, 1885.—*Boyd*, C.]

CERTAIN land of the plaintiff's having been expropriated by the defendants for the purposes of their railway in 1876, this action, which was for a *mandamus* to compel the defendants to arbitrate with the plaintiff as to compensation for his land, was begun in August, 1884. Judgment was pronounced on the 10th October, 1884, directing an arbitration. After judgment the parties by consent referred the matters in question to the Local Master of the Court at Belleville, as sole arbitrator and he made his award.

Up to the 25th May, 1883, the defendants' railway was an Ontario railway, but on that day it became subject to the exclusive legislative authority of Canada by 46 Vic. ch. 24, sec. 6 (D.)

Lash, Q.C., for the defendants, moved absolute an order *nisi* to set aside the award upon the facts of the case.

G. Tate Blackstock, for the plaintiff, shewed cause, and objected to the motion upon the ground, among others, that there is no appeal from an award under the Consolidated Railway Act of 1879, 42 Vic. ch. 9, (D.), contending that the proceedings must be under that Act as the action was begun after the 25th May, 1883,

BOYD, C.—*Demorest v. Midland Railway Co.*, 10 P. R. 73, was an application for a *mandamus* in respect of

land taken by the Grand Junction Railway in 1873, the use, possession, and occupation of which, as a railway track afterwards passed to the Midland railway. The application was made in October, 1882, and was argued in December of that year. It has, therefore, no application to the point before me for which it was cited, inasmuch as then the Midland Railway was still an Ontario railway, and not till the 25th May, 1883, was that line of railway declared to be for the general advantage of Canada, and therefore subject to the exclusive legislative authority of Canada by 46 Vic. ch. 24, sec. 6, (D.) This action was begun in August, 1884, and judgment was pronounced on the 10th October, 1884, in effect directing an arbitration according to the terms of the judgment in *Edwards v. Ontario and Quebec Railway*. The Master at Belleville was sole arbitrator, and made his award, which is now appealed against upon the facts, under the Ontario Railway Act. The objection was taken that the procedure in the Consolidated Railway Act of the Dominion (42 Vic. ch. 9, sec. 5, sub-sec. 17) applies, and that no appeal can be prosecuted under the Revised Ontario Railway Act, R. S. O., ch. 265, sec. 20, sub-secs. 19, 20. Various other objections were raised, which it is not needful to consider, as I think this one fatal. No vested right to compensation is interfered with by this legislation, but a different procedure is provided for its recovery in the case of an Ontario railway as compared with a Dominion railway. The character of this road was changed in 1883, after which the proceedings were begun for compensation treating the defendants as a Dominion company (see 1st paragraph of prayer in statement of claim.) As to proceedings initiated before May, 1883, it may well be that the forms of procedure provided by the Revised Statutes of Ontario should govern, but after that date all proceedings for compensation under the statute are controlled, in my opinion, by the Dominion legislation. The right to compensation even does not necessarily go back to the time when the land was taken in 1876, because, as pointed out by Chief

Justice Cameron in *Demorest v. Midland R. W. Co.*, 10 P. R. at p. 81, the notice to arbitrate may properly be in respect to lands *required* for the railway, which represents the state of facts when this action was begun. The Chief Justice was speaking in reference to the Ontario Act, but the same language is found in the Dominion Act, 42 Vic. ch. 9, sec. 9, sub-sec. 12.

Upon the ground that this objection is fatal I refuse the motion to set aside the award and discharge the rule *nisi* obtained for that purpose, with costs.

SNIDER v. SNIDER.

Delivery of Statement of defence—Time.

A statement of defence, delivered after the proper time and on the same day on which the plaintiff set the action down to be heard on motion for judgment, was *held* irregular, and the Court ordered that it should be struck out, and judgment granted for the plaintiff as prayed by the statement of claim, unless the defendant paid the costs of setting down the action and of the motion for judgment within a limited time.

[June 11, 1885.—*Boyd, C.*]

AN action for alimony.

No statement of defence having been filed within the proper time after delivery of statement of claim, the plaintiff's solicitors, who resided at Chatham, sent the papers to their Toronto agents to set the action down to be heard on motion for judgment.

On the day on which the Toronto agents set the cause down, the defendants solicitors delivered a statement of defence in Chatham.

Upon the return day of the notice of motion, *E. Douglas Armour* moved for judgment upon the statement of claim.

Holman, contra.

BOYD, C.—Held that the statement of defence was irregular, and directed that it should be struck out and judgment granted as prayed, unless the defendant, within ten days from taxation, should pay the costs of setting the action down, and of the motion, in which event the statement of defence was to stand.

RE HARNDEN, HARNDEN V. HARNDEN.

Bringing in accounts—Motion to commit—G. O. Chy. 201 and 296.

G. O. Chy. 201 and 296 are still in force in the Chancery Division.

Upon a motion to commit the defendant (an administrator) for neglecting to bring in his accounts before a day named pursuant to the direction of the Master,

Held, that personal service upon the defendant of the Master's direction and of the notice of motion to commit was not necessary.

[June 8, 1885—*Boyd, C.*]

AN administration matter in the Chancery Division in which a reference was directed to the local Master at Cobourg.

The Master, in proceeding with the reference, made an oral direction in the absence of the defendant, but in the presence of the Cobourg agent of his solicitor, that the defendant (the administrator) should bring in his accounts before a day named.

The defendant not having brought in his accounts as directed, a motion was made on behalf of the plaintiff for an order committing the defendant for default, &c.

No notice of the direction had been served on the defendant, and it was not shewn that it had in any way come to his knowledge. The notice of motion was not served on the defendant personally, but on the Toronto agents of his solicitor.

Watson, for the motion.

Shepley, contra, objected that the direction and notice of motion had not been served on the defendant personally, citing *Smith v. Marrin*, 4 C. L. T. 493.

Watson, in answer to the objection, cited G. O. Chy. 201 and 296.

BOYD, C.—The G. O. Chy. 201 and 296 are in force and shew plainly enough what should be done. The oral direction to the solicitor's agent, and the notice of motion served on the solicitor are sufficient. *Smith v. Marrin* does not affect this case, as G. O. Chy. 296 specially provides for it.

Order granted as asked, but not to issue till the 18th of June.

RE LAKE SUPERIOR NATIVE COPPER COMPANY.

Companies' Winding up Act, 45 Vic. ch. 23 (D.)—Appeal—Extending time for.

Cross-applications in respect of the same subject matter were argued together, and both were dismissed by a judgment pronounced on the 26th April, 1885. The question argued was an important one, viz., the *ultra vires* of an Act. Separate orders were taken out dismissing the two applications, and the time for appealing from both orders was extended till the 6th of June, on which day one of the parties gave notice of appeal from the order adverse to him. The other party, who was not desirous of appealing unless his opponent appealed, was advised too late to serve notice within the time limited, and therefore applied after the expiration of the time to have it extended.

Held, that it was a proper case for exercising a discretion in favor of the applicant, and leave to appeal was accordingly granted.

[June 22, 1885.—*Proudfoot, J.*]

A motion by one Plummer to extend the time for appealing to the Court of Appeal from an order of the Chancery Division pronounced by Proudfoot, J., on the 26th April, 1885.

The order in question was one dismissing the application of Plummer to set aside an order for the winding up of the Lake Superior Native Copper Company, (an English Corporation) which order was obtained without notice to Plummer, who was a creditor of the company. The winding up order was made by Ferguson, J., under the provisions of 45 Vic. ch. 23 (D.) as amended by 47 Vic. ch. 39 (D.)

The application to set aside the winding up order was made by Plummer in aid of his answer to an application to continue an injunction in *The Lake Superior Native Copper Co. v. Plummer*, and both applications were argued at the same time. Judgment was pronounced dismissing both applications and dissolving the injunction. Separate orders were taken out.

At the time that the orders were pronounced, Proudfoot, J., extended the time for both parties to appeal from them till the 6th of June, 1885.

The liquidator of the company gave notice of appeal from the order dissolving the injunction upon the 6th of June, the last day for giving such notice, but Plummer, who

did not wish to appeal from the other order unless the liquidator appealed from the one adverse to him, did not give notice in time, and now applied to have the time extended.

J. H. Macdonald, for Plummer. The question of extending the time for appealing is a matter entirely in the discretion of the Court. In this case the solicitor for Plummer did not wish to appeal unless the liquidator appealed, and he was under the impression that the liquidator did not mean to appeal, and was accordingly lulled into security until it was too late. This is a special circumstance which excuses the delay.

He cited *Re Blyth and Young*, 13 Ch. D. 416; *Re Manchester Economic Building Society*, 24 Ch. D. 488; *Dayer v. Robertson*, 9 P. R. 78.

Moss, Q. C., for the liquidator, referred to *Re Mullarkey*, 6 P. R. 95; *Miller v. Brown*, 9 P. R. 542; *Wilby v. The Standard Ins. Co.*, 10 P. R. 34, and to 45 Vic. ch. 23, sec. 79 (D.)

Rae, for the English liquidator of the Company.

PROUDFOOT, J.—My impression is, that the leave ought to be granted notwithstanding the lapse of time. Here is the special circumstance of two orders made at the same time and upon the same subject. From the way the argument was conducted before me there might have been but one order, although two were actually taken out. The solicitor for the liquidator expressed his intention of appealing from the order; Plummer's solicitor told him that if the liquidator appealed, he should do so also. Then the liquidator delayed till the end of the time for appealing, and the other was thrown over. The question for discussion on appeal from the two orders is a very important one, viz., the *ultra vires* of 47 Vic. ch. 39 (D.) which extends the application of 45 Vic. ch. 23 (D.) to foreign corporations doing business in Canada. The time ought to be extended on payment of costs, and the appeal brought on at the same time as the other.

SMITH ET AL. V. GREEY ET AL.

Foreign commission—Issue on pleadings.

Upon an application for a foreign commisssion it is not necessary to shew that the action is technically at issue : it is sufficient that it be shewn that some issue is raised on the pleadings which must be tried in the action.

[June 26, 1885.—*Boyd, C.*]

A patent action.

H. D. Gamble, for the defendants, moved for an order for leave to issue commissions to take evidence in Great Britain and the United States.

Arnoldi, for the plaintiffs, objected that the action was not at issue, referring to a decision upon an application for a commission in this same action, reported 10 P. R. 531.

It appeared that the time for reply had not yet expired, but that a definite issue was raised by the defence as to prior user.

BOYD, C.—It is not necessary to have the cause technically at issue; it is sufficient to shew that some issue is raised on the pleadings delivered, which must be tried if the action be tried at all. If no such issue be raised, it is impossible for the party seeking the commission to swear that the evidence sought is material and necessary. The usual order for a commission should be granted.

MOXLEY v. THE CANADA ATLANTIC RAILWAY COMPANY.

Production of documents—Better affidavit—When ordered.

The usual affidavit on production of documents, made by an officer of the defendants, contained a statement that the defendants objected to produce their repairs book and train register, but that they would produce such portions of the books "as are relevant, for inspection at the offices of the company;" and a further statement, that the company "had sealed up such parts of the said books as do not relate to the matters in question in this action." At the trial the plaintiff called as witnesses, the train despatcher, locomotive engineer, and an engine driver of the defendants. The presiding Judge refused on the evidence then given to direct the books to be unsealed.

Held, reversing the order of Rose, J., 10 P. R. p. 553, that the facts of the case shewed a right in the plaintiff to have these books of the company produced.

Even against a party's own affidavit, if the Court is reasonably certain that he has erroneously represented or misrepresented the nature of documents, a further affidavit on production will be ordered.

The rule laid down in *Jones v. The Monte Video Gas Co.*, 5 Q. B. D. 556, may be accepted as the general rule on the subject of the production of documents, but it should be read in conjunction with *The Attorney General v. Emerson*, 10 Q. B. D. 191.

[May 27, 1885.—*The Queen's Bench Division.*

A motion upon notice was made before the Master in Chambers that the defendants should file a better and further affidavit on production, which was allowed.

The motion was made because at the trial of the cause at the Fall Assizes of 1884, before Cameron, C. J., the fact was asserted by the plaintiff that an entry of the bonnet of the engine car being out of repair at the time in question had been made by an employee of the defendants in the repair book of the company, and the book was called for but was not produced by the defendants. The following is the statement of what took place at the trial respecting the book:

The engine driver said, at p. 111 of the evidence: "There is a book in the shop, and when we make a report we put it in the book."

Mr. McCarthy for the plaintiff, to Mr. Bethune for the defendants: "Will you produce that book?"

Mr. Bethune,—“I am not called upon to say whether I will produce it or not. In the first place you cannot give secondary evidence without a notice to produce that book.”

Then at p. 122, the engine driver was again asked :

Q. "Did you make a report in that book?" A. "Yes."

Mr. McCarthy,—“Will you let me see that book, Mr. Bethune?”

Mr. Bethune,—“I do not object to producing this book now for this case, but I do not want it produced to encourage others to bring other actions.”

Mr. McCarthy,—“I want the repair book with the entry of the 23rd July.

Mr. Bethune,—“There is no entry in the book of that date.”

Mr. McCarthy, to witness,—“At the time you found this bonnet out of repair, did you enter it in the repair book in the shop?” A. “Yes.”

Q. “Did you enter that in the shop?” A. “Yes.”

Mr. Bethune, to witness,—“Can you write?” A. “No, the foreman entered it. I can read, but not write.”

Mr. McCarthy, to witness,—“Did you see the foreman make this entry?” A. “No, I told him to do it, and the next day the netting was changed.”

His Lordship,—“It is quite impossible now to say that is the entry. My own impression is that it is to be regretted the book is not produced.”

Mr. McCarthy,—“I think now this case should be postponed, as I cannot get at the books of the defendants.”

Mr. Bethune,—“I of course object to any postponement.”

His Lordship,—“If the plaintiff asks the adjournment, I do not know that I can deny it. I adjourn the case to the next Assizes, with costs to abide the event.”

The defendants in answer to the motion in Chambers, filed the affidavit of Mr. Peden, the Acting Superintendent and General Freight and Passenger Agent of the defendants. He admitted the defendants had the documents relating to the matters in question, set forth in the first and second parts of the Schedule attached to his affidavit. He said the defendants objected to produce the documents in the second part of the Schedule mentioned; that they were in constant use in the business of the defendants, and were necessary for that purpose, and the defendants therefore objected to produce them, but the defendants offered to produce such portions of the said books as are relevant for inspection at the office of the Company, but they sealed up

such parts of the books as did not relate to the matters in question in this action; that no portion of the parts of the said books so sealed up related to the said matters in question, or any of them; and that the defendants had no other deeds, &c., relative to such matters, or any of them, other than and except the documents set forth in the first and second schedules thereto, and the pleadings and other proceedings in the action.

SCHEDULE.

FIRST PART.

1. Letter from plaintiff's solicitor dated —.
2. Extract from repair book, showing all entries from 1st. August 1884 to 27th August 1884, inclusive.
3. Extract from train register, showing particulars of trains arriving on 19th August, 1884.

SECOND PART.

1. Repair Book (all sealed up except as above).
2. Train register (all sealed up except the entries of the 19th of August).

An appeal from the Master's order was taken on the 10th of February last to Mr. Justice Rose, who allowed the appeal and dismissed the original application. (See 10 P. R. p. 553.)

The plaintiff thereupon appealed to this Court to set aside the order of Mr. Justice Rose.

On the 7th of March, *Lefroy*, for the defendants, showed cause. The plaintiff can claim an order for a better or fuller production only in the following cases: if the pleadings of the defendant admit a case which shows it should be granted, or if his affidavit of production contain the like admission, or such an admission can be inferred from any documents referred to in his affidavit. And nothing of that kind can be inferred against the defendants from anything whatever in this action. The facts are against the claim which is made by the plaintiff. The

cause of action is for damage done to the plaintiff's property by fire alleged to have been caused by sparks which came from the defendants' engine car No. 4 upon the 19th of August, 1884.

The repairs book for the whole of that month the defendants have produced, and the train register for the 19th of that month they have also produced, but the plaintiff claims to be allowed to go further back than the earlier of either of these dates without having made any case for such a discovery. He referred to the following cases: *Jones v. The Montevideo Gas Co.*, 5 Q. B. D. 556; *Sichel and Chance's Law of Discovery*, 139; *Taylor v. Batten*, 4 Q. B. D. 85-89, in appeal; *Hugh v. Garrett*, W. N. 1874, p. 229; *Peel on Discovery*, 117; *Minet v. Morgan*, L. R. 8 Ch. 361; *Gardner v. Irvin*, 4 Ex. D. 49, in appeal; *Johnson v. Smith*, 25 W. R. 539; *Welsh Steam Coal Collieries v. Gaskell*, 36 L. T. N. S. 352; *Atty.-Gen'l. v. Castleford Local Board*, 27 L. T. N. S. 644; *Corporation of Hastings v. Ivall*, L. R. 8 Ch. 1017; *Bewicke v. Graham*, 7 Q. B. D. 400, in appeal. He also contended that the following pages of the evidence at the trial, relied upon by the plaintiff and referred to by Mr. Justice Rose in his judgment, did not make a case which entitled the plaintiff to a fuller production or discovery—pages 65, 66, 67, 69, 75, 77, 98, 109, 110, 111, 119, 120, 123.

Clement supported the motion. The plaintiff relies upon the evidence at the pages referred to of the notes of the trial, as showing his right to have the order made for a better production. The nature of the books of which the inspection is asked is spoken of in the evidence, and such books must be material.

It was said at the trial that an engine of the defendants threw sparks on the 23rd of July, and the plaintiff desires to shew that the engine which was defective then was the engine car No. 4 which was defective, and which caused the fire complained of on the 19th of August.

He referred to a copy of the judgment of the Privy Council in *The Canada Central Railway Co. v. McLaren*,

not yet published in the reports, and to the original case, *McLaren v. The Canada Central Railway Co.*, in appeal here: 8 A. R. 564; *Lyell v. Kennedy*, 27 Ch. D. at p. 19; *Attorney General v. Emerson*, 10 Q. B. D. 191 in appeal; *Greenwood v. Greenwood* 6 W. R. 119; *Noel v. Noel*, 1 DeG. J. & S. 468; and as to discovery through interrogatories, *Saull v. Browne*, L. R. 17 Eq. 402.

WILSON, C. J.—The plaintiff's case, as stated in the formal statement of claim, is, that the defendants so negligently and unskilfully managed their locomotive engine containing fire and burning matter which they were driving along their railway, near to the wood, timber, &c., in and upon the plaintiff's land, near to the defendants' railway, and under their management, and the engine was so insufficiently and improperly constructed that sparks from the fire escaped from the engine to and upon the plaintiff's land and set on fire and destroyed the said wood, &c.

The defendants have pleaded the general issue by statute.

The plaintiff gave evidence at the trial that the engine that passed the plaintiff's land on the 19th of August, 1884, about that hour of that day, was numbered 4.

The plaintiff desires to show that locomotive No. 4 was reported by the driver of it or by some officer of the company to the proper officer or department of the company as out of repair, and to prove that he relies upon the entry of a report to that effect having been made in the repair book, or in the train register of the company, as far back as the 23rd of July. It may be said that the time back is too great from which the rule or presumption of cause and effect can be applied. The reported defect upon the 23rd of July will not prove the defect still continued up to the 19th of August. I cannot say the length of time between the report made and the happening of the accident is a conclusive answer to the admissibility of the evidence. Try it by the test applied by the learned Lords of the

Judicial Committee of the Privy Council in the case of *The Canada Central R. Co. v. McLaren*, "there is no difference in principle between asking the witness to state the verbal instructions which he gave and putting his written instructions in his hand and asking him to read them. Such an entry as that in question when it is so put in evidence cannot be regarded as a mere statement or narrative of fact—it was an instruction given, an act done in the ordinary course of the employment of the witness," and I think it will be seen the evidence was admissible.

The time between the two dates before mentioned is not so great as to exclude the evidence on the ground of irrelevancy—although it may be the weight or applicability of the evidence may be thereby considerably lessened. If the length of time be a ground for refusing a better production of the repair book, that objection cannot be made for refusing to produce the train register, and that book the defendants refuse to exhibit for any other purpose than for the examination of the entries made in it upon the very day of the accident. It appears to me impossible to say the state and condition of the locomotive, which, no doubt, was the defendants' property, and which passed the plaintiff's premises just before the accident happened, and which is charged to have caused the damage, are not matters which are material to be considered in support of the plaintiff's case, or that they may not afford evidence which may impeach the case of the defendants. If that be so the entries are examinable by the plaintiff according to the principles laid down in what may be called a leading case on the subject, *Combev. The Corporation of London* 1 Y. & C. p. 651.

In *Newton v. Berresford*, 1 Younge Ex. at p. 381, Lord Lyndhurst considered that if the documents relate to the matters in question, it is not sufficient to say they will not assist the plaintiff's case, as that must be matter of opinion.

In *Saull v. Browne*, L. R. 17 Eq. 402, the Master of the Rolls, notwithstanding the defendants answer did not admit their possession of any documents, directed them to

make a further affidavit, because he was satisfied they had documents in their possession material to the questions in the cause.

So a further affidavit has been required to be made upon *a reasonable suspicion* by the Court: *Noel v. Noel*, 1 DeG. J. & S. 468. On appeal, Turner, L. J. in 9 Jur. N. S. 590, said, "There is nothing which ties the court down to a single affidavit, and therefore if anything has happened to lead the Court to think that another affidavit is required, it is in the power of the Court to require it," although it was contended, the 15 & 16 Vic., c. 86, sec. 18, merely enabled the Court to direct the one affidavit to be made. *Manby v. Bewicke*, 8 DeG. M. & G. 470, 2 Jur. N. S. 671, shews the party cannot be cross-examined upon his affidavit, which he makes with production, or in answer to the order for production. But Rule 226 of the Ontario Judicature Act expressly allows it in such a case, although there is no such rule in England.

The case of *The Attorney General v. Emerson*, 10 Q. B. D. 191, shows the Court will order a further production against the defendant's affidavit, if they are reasonably certain the defendant has erroneously represented or mis-conceived the nature of such documents.

The affidavit filed here is wholly insufficient. It states that the defendants object to production of the documents in question because "they are in constant use in the business of the defendants, and are necessary for that purpose." It is true the defendants also say, "that no portion of the parts of the books so sealed up relates to the said matters in question or any of them," but that is by no means a satisfactory affidavit, and, besides, the counsel for the defendants, at the trial, when asked if he would produce the books said, "I don't object to producing this book now for this case, but I do not want them produced to encourage others to bring actions." p. 122 of the evidence.

The rule which was laid down by the Court of Appeal in *Jones v. The Montevideo Gas Co.*, 5 Q. B. D. 556, may be accepted as the general rule on the subject. It should

be read, however, in conjunction with *The Atty.-Gen'l. v. Emerson*, 10 Q. B. D. 191.

The facts of this case, I think, shew a right in the plaintiff to have these books of the company produced, because it is an important fact on the issue relating to the condition of the engine, whether or not the defendants were or were not informed by one of their own officials, whether by report, writing, or *vivâ voce*, and whose duty it was to make such communication, in what state the engine was at a time material to the trial of that issue.

Both parties are interested in the condition of the engine so far as the present litigation is concerned: *In re Pickering*, 25 Ch. D. 247. An order, I should think, might have been made on the defendants, if necessary, to allow an inspection of the engine itself, if that inspection had been shewn to have been requisite for the cause; and why not of entries relating to the engine? The affidavit of Mr. Peden, as well as the evidence at the trial, shews there are such entries. It is obvious they must be material in the action. And both the affidavit and the evidence just referred to shew the inspection asked for should be allowed; for in the one case the excuse for not producing the books was the fear of other actions being brought against the company, and in the other that the books were so much in use by the company they could not be spared from their office. And yet the books were in Court at the time of the trial, and were not produced then for a very insufficient reason, but not nearly so insufficient a reason as that assigned in the affidavit; and such as it was, it was contradicted by the books being in Court at the trial.

We think there is no decision against the inspection asked for, nor is there any rule or principle violated in allowing it, and we therefore reverse the order of Mr. Justice Rose, and affirm the order of the Master in Chambers and grant the order for the production and inspection of the books, and of all entries relating to the engine number 4 from, and inclusive of, the 1st of June, 1884, until, and inclusive of, the last day of August thereafter,

and that the costs of the motion in Chambers, and in appeal before Mr. Justice Rose and to this Court be costs in the cause to the plaintiff in any event.

ARMOUR and O'CONNOR, JJ., concurred.

Order granted.

HEWITT V. HEISE.

Adding parties—Rules 103 (a) and 108 O. J. A.

The plaintiff and P. both claimed to be entitled by assignment to a mortgage made by the defendant. The defendant paid P. one gale of interest and received indemnity for the amount paid against any claim on the part of the plaintiff. The plaintiff then brought this action claiming the interest which had been paid to P., and also the principal for default in payment of interest. The defendant applied to have P. added as a co-defendant.

Held, not a proper case for adding P. as a party under Rule 103 (a), but rather one in which a notice might be served upon P. by the defendant under Rule 108, O. J. A.

Quære, per the MASTER-IN-CHAMBERS, whether the defendant had not a remedy by interpleader.

[June 2, 1885.—*The Master-in-Chambers.*]

[June 25, 1885.—*Osler, J. A.*]

THE defendant gave a mortgage on certain land to A. who made two different assignments of the mortgage: one to the plaintiff which was the first in point of time, and the other to B. who assigned to one Pegg. B. and Pegg registered their assignments before the plaintiff, and when a gale of interest became due, the defendant (the mortgagor) paid it to Pegg with notice of the plaintiff's assignment, believing, as he swore, that Pegg had the better title, and taking indemnity from Pegg against any claim to the interest paid, which should be made on the part of the plaintiff.

The plaintiff then brought this action for the gale of interest alleged to be due him and for the principal, which became due in default of interest.

Immediately after appearance the defendant moved to add Pegg as a party defendant.

E. B. Brown, for the motion. This is a case which comes under the terms of Rule 103 (a) O. J. A. The question to be tried in the action is: which of the assignees is entitled to be paid the interest and ultimately the principal? That question should not be litigated in the absence of Pegg: if he is brought into this action and bound by the result it may save further litigation. Such an order as is sought here was made in *Driver v. Canada Permanent Loan and Savings Co.*, 1 C. L. T. 730.

Aylesworth, for the plaintiff. The plaintiff's record should not be cumbered by the addition of a defendant against whom he (the plaintiff) is seeking nothing. The defendant's proper course is to serve a notice under Rule 108 O. J. A.

Pegg, the proposed party, consented to the order asked.

THE MASTER-IN-CHAMBERS.—The proper remedy for the defendant would have been interpleader; but the defendant has paid Pegg, the second assignee, so that interpleader is out of the question as to the interest. As to the \$1,900, the principal money, it may possibly be, now, that interpleader is out of the question here, too; but I do not think it. It is true the parties do not stand, as to their claims, quite equally. It is only Hewitt that can claim the present payment of the \$1,900 under any circumstances, for Pegg, if entitled to the principal, has received the interest, and as to him there is no forfeiture. My belief is, that in the true spirit of the Interpleader Acts, there ought to be a remedy for the defendant by interpleader, because, although one of the parties cannot claim a present right to payment of the \$1,900, which the other does, yet they both claim the substantial right to the \$1,900, a right in and to the whole, which, in either of the parties, by its nature, necessarily excludes the right of the other,

But interpleader being not now in question, in what

view should the second assignee Pegg be joined? The plaintiff does not wish to join him. The plaintiff has no claim against him—nothing to enforce; at least I will say nothing that he wishes to enforce. Then it is not for Pegg's own sake, I suppose, for Pegg at present has all that he can ask under any circumstances. Then it must be for the defendant's sake, if at all. But the defendant can defend himself against the plaintiff just as well without Pegg on the record as with him. The question important to the defendant in this suit is not whether Pegg is entitled, but whether the plaintiff is entitled, and the only value to the defendant of shewing Pegg entitled would be as proof that the plaintiff was not.

The defendant's right is, as between him and Pegg, indemnity from Pegg, nothing more, and here the defendant, it seems to me, has done nothing to forfeit his rights. The defendant can give Pegg notice under Rule 108, and Pegg, it seems, will appear. What then? See Rules 110, 111. Pegg would get leave, if he desired it, to dispute the plaintiff's claim in the action as against the defendant, and would, no doubt, be bound by the result. But any recovery against Pegg must be deferred until an action brought against him by the present defendant. That I take to be the law: see *Lockie v. Tennant*, 5 O. R. 52, and *Dundas v. Gilmour*, 2 O. R. 463.

I think I cannot make Pegg a party and make the plaintiff try issues with him whether the plaintiff will or no. Nor can I, according to the above cases, encumber the plaintiff's record with issues between Pegg and the defendant.

On appeal to a Judge in Chambers, argued by the same counsel.

OSLER, J. A.—I think the judgment of the learned Master-in-Chambers is right. What is the question to be tried in the action? Whether the plaintiff Hewitt is assignee of the mortgage. If he is, then default having

been made in payment of the interest, he will be entitled to recover the principal if the default shall not be condoned by paying the interest and obtaining a stay of proceedings under the Act.

Pegg, the other assignee, is not claiming anything, as he has been paid the interest, nor is the plaintiff claiming anything from him. As to him the principal is not in default, and he has indemnified the defendant, who chose to take that course instead of interpleading.

The defendant can defend himself against the plaintiff without Pegg's presence as a party plaintiff or defendant in the suit. But if the plaintiff succeeds he will want indemnity from Pegg, which he cannot get in this action: *Dundas v. Gilmour*, 2 O. R. 463; *Lockie v. Tennant*, 5 O. R. 52. It is a case expressly provided for, and it seems to me the proper course is that which the Master has pointed out, viz., to proceed under Rules 107 and 108: *Howell v. The London General Omnibus Co.*, 2 Ex. D. pp. 374-381. In effect that gives the defendant all the protection he needs, since Pegg being bound by the determination in this suit, cannot, if the plaintiff succeeds, claim anything further under his assignment.

Appeal dismissed.

Costs to the plaintiff in any event.

CANADIAN LAND AND EMIGRATION COMPANY V. TOWNSHIP
OF DYSART, ET AL.*Payment out of Court—Appeal to Supreme Court of Canada—Discretion of Court.*

The defendants succeeded at the trial, in the Divisional Court, and in the Court of Appeal. Pending an appeal by the plaintiffs to the Supreme Court of Canada, the defendants applied for payment out of Court to them of a sum paid in by the plaintiffs representing the whole subject matter of the litigation.

Held, that the application was in the discretion of the Court: that that discretion should be exercised in the same way as upon an appeal to the Court of Appeal; and that the application should therefore be refused, following *King v. Duncan*, 9 P. R. 61.

[June 27, 1885.—*Ferguson, J.*]

AN action to restrain the increase by a Court of Revision of the assessment of the plaintiffs' lands in the township of Dysart, the said assessment and increase being alleged to have been grossly excessive and fraudulent, also to restrain the municipality from levying on the plaintiffs' property under the said assessment.

An injunction that had been previously granted against the municipality by Proudfoot, J., was dissolved; and the action was dismissed by Ferguson, J., at the trial, on the ground that the plaintiffs' proper remedy was an appeal to the Stipendiary Magistrate.

The plaintiffs subsequently applied to Ferguson, J., to continue until after judgment was given on their appeal to the Chancery Divisional Court, the injunction of Proudfoot, J., as aforesaid, as far as it restrained the municipality from levying on the company's property, and an order was made by Ferguson, J., as asked by the plaintiffs, upon their paying into Court the full amount of the taxes claimed by the municipality. The plaintiffs thereupon paid into Court upwards of \$7,000.

The appeal to the Divisional Court was unsuccessful, and the plaintiffs prosecuted a further appeal to the Court of Appeal, which was also unsuccessful.

Pending the latter appeal, the whole of the money

remained in Court, with the exception of about \$2,000, which, with the consent of the plaintiffs, was paid out to the defendants to answer the taxes which the plaintiffs admitted would be due to the defendants on a fair assessment of the plaintiffs' property.

The judgment of the Court of Appeal was delivered on the 23rd day of June, 1885, and the plaintiffs immediately took the necessary steps for an appeal to the Supreme Court of Canada. The proper security being given, Burton, J. A., made the usual order allowing the appeal to the Supreme Court, and staying proceedings with regard to the moneys in Court as far as he had jurisdiction.

The defendants immediately, on judgment being given in their favor in the Court of Appeal, and before the making of the order by Burton, J. A., served the plaintiffs with notice of motion for payment out of the moneys in Court which had been paid in under the aforesaid order of Ferguson, J.

The plaintiffs thereupon gave notice of a cross motion, returnable at the same time as the defendants' motion, for an order staying any proceedings of the defendants towards getting the aforesaid moneys out of Court.

Both these applications came before Boyd, C., and were enlarged by him before Ferguson, J., as he had made the original order.

W. H. Lockhart Gordon, for the plaintiffs.

W. H. P. Clement, for the defendants.

FERGUSON, J.—The proceedings and the theory of the practice as to staying proceedings in cases of appeals to the Supreme Court seem to be very similar to those in cases of appeals to the Court of Appeal, although an appeal to the Court of Appeal is by statute a step in the cause, whilst the appeal to the Supreme Court may not be such a step.

The learned Judge in the Court of Appeal stayed all proceedings that he thought he had the power to stay un-

der the provisions of the Act, or the practice, and there can be no reasonable doubt, I think, that had the matter been in the form of a judgment and execution, the *fiat* would have been granted under the 33rd section of the Act.

The money in Court represents the whole subject matter of further litigation. It was paid in under an order that it should be paid in "to the credit of the action" and I think that although the order does not so express it, the money was to be and is subject to the further order of the Court. These motions have been transmitted to me for the reason that the money was paid into Court pursuant to an order made by me.

I think that the payment out of this money (which was not paid into Court for any specific purpose, that has been satisfied in favour of the party paying it in, or for any specific purpose at all), is a matter that is in the discretion of the Court at the present time under the existing circumstances, if indeed the party who has lodged the appeal to the Supreme Court has not a stronger claim than this would seem to indicate.

No doubt it will be an inconvenience to the defendants not to get this money until after the determination of the appeal, that is, assuming that they are entitled to it. There is also scarcely any doubt that the payment out of the money now would be in a certain sense prejudicial to the plaintiffs, if it should ultimately be held that the defendants are not entitled to it.

In the case of *King v. Duncan*, 9 P. R. 61, I referred to a number of authorities on the subject. That was, however, a case of an appeal (pending) to the Court of Appeal. I think, however, that the same principles apply, and that the discretion (assuming it to be a matter of discretion) should be exercised in the same way. The case *Cotton v. Corby*, 7 Gr. 50, may also be looked at.

I am of the opinion that the application for the payment out of the money should be refused. I am also of the opinion that there should be leave to the defendants to apply again in case there should be any unreasonable delay

in the prosecution of the proceedings in the appeal to the Supreme Court. I think that appeal should be prosecuted with all possible diligence.

Owing to what Mr. Gordon said at the conclusion of his argument, I do not deem it necessary to say anything respecting the cross-motion.

I think that under the circumstances, there should be no costs of either motion.

Order accordingly.

COPELAND V. THE CORPORATION OF THE TOWNSHIP OF
BLENHEIM.

*Costs of trial where jury disagree—R. 428 O. J. A.—“Following the event,”
meaning of.*

The costs of a trial which was abortive because the jury disagreed, no order to the contrary having been made by the Judge at the trial, were *held* taxable against the defendants by the plaintiff who ultimately succeeded.

[July 2, 1885.—*Rose, J.*]

THIS was an appeal from Mr. Clark, one of the taxing officers, he refusing to tax to the plaintiff the costs of the first trial herein, the jury having disagreed.

The action was for damages sustained by plaintiff from injuries caused by falling into an opening in the sidewalk, the opening leading into an excavation for a cellar.

At the first trial the jury disagreed. On the second they found a verdict for the plaintiff, and on motion before the Divisional Court the verdict was sustained.

Langton, for the appeal.

Holman, contra.

ROSE, J.—I have referred to Mr. Clark, and he tells me that by his reading of Rule 428 he was inclined to tax the

costs of the first trial to the plaintiff, but as the practice prior to the Judicature Act had been not to allow such costs, he thought it best to disallow them, leaving the plaintiff to appeal and thus settle the practice.

There is no case exactly in point, but Mr. Langton referred to four which I think practically decide the question.

The rule, so far as we need to consider its terms, is as follows :

“Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court. * * * Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn, the Judge upon whom such action or issue is tried or the Court shall otherwise order.”

This rule is identical with the English rule.

It seems to me that, apart from any preceding decisions or practice, the rule is simple and easy of construction.

To apply it to the present case. The plaintiff as now declared by the judgment of the Court, was injured through the negligence of the defendants. They wrongfully resisted his claim, compelled him to bring his action, so pressed their wrongful defence as to confuse the jury and prevent their agreeing, and the plaintiff was delayed in the recovery of his claim until another court, and put to the costs of two trials. Why should not the defendants pay all such costs? They have been incurred by reason of their wrong doing.

The “event” has been decided to be just what it implies, viz., “the result of the entire litigation :” *Field v. Great Northern R. W. Co.*, 3 Ex. D. 261. The costs were certainly incurred by the plaintiff in the prosecution of his cause, and the wording of the rule is clear—such costs shall abide the event.

If the plaintiff had, by any misconduct or carelessness at the first trial, induced the disagreement, then on application to the learned Judge presiding at the second trial,

who would, if necessary, have conferred with the learned Judge presiding at the first trial, an order might have been obtained depriving him of such costs "for good cause shewn."

The first clause of the head note in *Field v. Great Northern R. W. Co.*, is as follows: "The event mentioned in Order LV., is the result of all the proceedings incidental to the litigation, and the costs which follow the event include the costs of all the stages of that litigation."

It was argued, as stated by Kelly, C. B., at p. 262, "that the first trial was null and void, and had no event at all, and therefore that the costs of that trial are thrown away." The learned Chief Baron does not stay to discuss the facts, but answers: "I, however, think that the event which the costs follow is the conclusion of the whole matter or proceeding which commenced with the writ of summons and ended with the final judgment, and that the party who succeeds in his action is, in the absence of any special directions or orders, entitled to the whole costs of the entire action."

Green v. Wright, 2 C. P. D. 354, is cited and approved of. There a nonsuit was set aside and a new trial granted, on which the plaintiff had a verdict and had the costs of the first trial as following the event.

Green v. Wright followed *Parsons v. Tinling*, p. 119, same vol., where it was held that "the effect of the Judicature Act, 1875, Order LV., is to repeal the previous statutes as to costs, with the exception of such of the provisions of the County Courts Act, 1867, as are expressly preserved by sec. 67 of the Judicature Act, 1873." There the plaintiff, in an action of libel recovered one farthing damages. The Judge at the trial refused to give any certificate with regard to costs. *Held*, that by Order LV. the plaintiff was entitled to costs.

Parsons v. Tinling governed the Master in *Garnett v. Bradley*. The defendant appealed to a Judge in Chambers who referred the matter to the Court. The Exchequer Division, acting on the same authority, refused to review

the Master's taxation. The defendant appealed. The judgment of the Court of Appeal is found in 2 Ex. D. 349, reversing the judgment of the Exchequer Division. The House of Lords, however, 3 App. Cas. 944, held that the Master was right, approved of *Parsons v. Tinling*, and reversed the Judgment of the Court of Appeal.

I think the plaintiff is entitled to the costs of the first trial.

McGARVEY V. THE CORPORATION OF THE TOWN OF
STRATHROY.

Costs—Scale of.

An order in Chambers referred an action in the High Court of Justice to a Master to assess the damages, and directed that the costs should be taxed to whichever party was successful in a certain appeal. There was no trial, and no judgment was entered. The Master assessed the damages at \$60, and the taxing officer taxed to the plaintiff, who succeeded in the appeal, his costs upon the High Court scale.

Held, that the officer had no power under the order to determine the scale of costs, and he was therefore right in taxing upon the scale of the Court in which the action was brought.

[July 3, 1885.—*Rose, J.*]

THIS was an appeal from the taxation of costs by the Deputy Clerk of this Court at London.

Aylesworth, for the appeal.

Folinsbee, contra.

ROSE, J.—The ground of appeal mainly is that the officer should have taxed the plaintiff's costs according to the Division Court instead of the High Court scale.

The action was for damages sustained by the plaintiff from water wrongfully thrown upon the plaintiff's land.

The action was commenced on the 29th of October, 1883, and the pleadings show a proper case for investigation in the High Court.

The defendants, however, say that in an action commenced 30th December, 1882, in the Chancery Division in which a decree was obtained on the 15th June, 1883, the question of right was determined adversely to the defendants and that this action was really only for an assessment of damages which could have been assessed in the former action.

It would appear, however, that the damages claimed in this action arose subsequently. I am treating the claim as if it never had embraced paragraph 5, but had been confined to the same land as set out in the statement of claim in the first action.

The defendants, however, in their pleadings did not admit the plaintiff's right to recover and submit to an assessment, but raised serious defences.

On the 19th of April, the defendants gave the plaintiff notice of trial for the 1st of May. On the 23rd of April, the plaintiff served a notice of motion for an order to consolidate the two actions, to stay proceedings herein, and for an enquiry into the damages claimed herein before the Master at London, before whom the reference in the former suit was pending.

On the 26th of April a consent order was obtained staying all proceeding in this action, (2) ordering that the damages claimed herein be assessed by the Master in the reference in the first action, (3) ordering that the damages in the first action be assessed up to date of report, (4) ordering that the costs of both parties of this action be costs to the successful party in the appeal of the cause firstly above mentioned.

Pending the reference to the Master in the first action an appeal was taken to the Court of Appeal from the judgment at the hearing.

The plaintiff was successful in the appeal and the Master reported her damages in the first action at \$150, and in the second at \$60. Thereupon the plaintiff brought in her bill of costs in the second action, and had them taxed. The officer ruled that under the order she was entitled to full costs of the High Court.

The order staying proceedings may possibly be not very express in its terms. It does not provide for payment of the damages claimed in this action unless they are to be added to the damages assessed in the first action, and be recovered under the judgment in that cause. There seems little doubt that was the intention of the parties.

This action was by such order stayed, that is, for ever stayed, and the damages having been provided for, it was necessary to provide for the costs, and by consent the learned Master in Chambers ordered as above, that is, as the event has shewn, he ordered that the plaintiff should have the costs of this action, she being the successful party in the appeal.

That order was made without reference to the amount of damages. It has become a direction to the taxing officer to tax the costs of this action to the plaintiff. No judgment is to be entered, the action was stayed, the costs are recoverable not under a judgment but under the order, and, unless paid, execution will issue on the order to recover them.

Rule 511 was invoked. That provides the scale of costs where judgment is to be entered without trial or order as to costs, and I think obviously cannot apply.

It seems to me under the order all the taxing officer had to do was to enquire who had been the successful party in the appeal, and without further enquiry tax the costs of the action to such party.

This he did, and, in my opinion, he was right, and the appeal against his ruling fails.

TAYLOR V. COOK, DESPOND & CO.

Judgment against partnership—R. 322, O. J. A.—Examination of one of several defendants—Sec. 156, C. L. P. A.—Admission by one partner.

The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership binds all the partners, unless they seek, by an examination of some of themselves, to contradict or qualify the statements of the partner whose evidence they object to.

[July 4, 1885.—*The Master-in-Chambers.*]

THIS was an action against a partnership firm, consisting of four members, for rent amounting to \$625.50, alleged to be due under a demise, for possession of the demised premises, and for payment for work done, &c.

The partners Despond and Statten delivered no defence.

The partners Cook and Featherstone, delivered a joint statement of defence denying certain of the matters alleged in the statement of claim, and setting up a variation in the terms of the lease.

The defendant Cook was examined by the plaintiff, in the presence of his co-defendant Featherstone, and admitted that \$325 was due the plaintiff for rent.

The plaintiff moved under Rule 322, O. J. A. for judgment against the partnership for the sum of \$325, and for leave to proceed notwithstanding the judgment for the residue of their claim.

Watson, for the motion.

Ogden, contra.

THE-MASTER-IN-CHAMBERS.—There are four partners here sued in the style of the partnership firm. Of these Cook has been examined. Three of the partners, I understand, do not object to this motion for judgment for the plaintiff for \$325. The fourth, Mr. Featherstone, objects. It is objected, among other things, that statements and admissions on examination under sec. 156, C. L. P. Act

by one partner do not warrant a judgment against the firm. There has been a dissolution of the partnership, but the whole examination relates to matters which occurred during the partnership. Sec. 156 provides that "where one of several plaintiffs or defendants has been examined, any other plaintiff or defendant united in interest may be examined in his own behalf, or on behalf of those united with him in interest, to the same extent as the party examined." Now Featherstone, it is stated and not denied, was present at the examination of Cook, but none of the defendants sought to have any one examined, after Cook's examination. At any rate, Featherstone is represented by the same solicitor as Cook. As to the binding effect of an admission by one of several partners upon his co-partners, I refer to *Parker v. Morrel*, 2 Phil. 453, to *Lindley on Partnership*, 4th ed. pp. 264, 409, 413, and to *Wilson v. Roger, Maclay & Co.*, 10 P. R. 355.

By the Judicature Act a service on one partner where the partners are sued in the firm name is good as against all; a default of appearance would warrant a judgment against the firm; that really would be a judgment by confession.

In fact I cannot doubt that from authority the statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership, would bind all the partners, if they did not seek by an examination of some of themselves to contradict or qualify the statements of the partner whose evidence they objected to.

There are issues upon the pleadings, but none of them stand in the way of the judgment I am about to give. It is plain then, from the examination of Mr. Cook, that up to the 1st of January, 1884, there was, and is now, due to the plaintiff on account of the rent claimed in this action, \$325, and I order that the plaintiff may have present judgment for that amount, leaving open all question of costs between the parties, and allowing the plaintiff to proceed in the action for his money claim beyond the

\$325, and for his other claims in the action. No doubt if I were dealing with costs, the plaintiff should have the costs of this motion, but I leave it with the rest to be determined at the end of the suit.

WESTGATE V. WESTGATE ET AL.

Costs of official guardian—Fraud by infant.

The official guardian's costs of defending this action on behalf of an infant defendant were ordered to be paid by the plaintiff, notwithstanding that judgment was pronounced in favour of the plaintiff against the infant defendant, and that the latter had been found to be a party to the fraud which occasioned the action.

[July 4, 1885.—*Ferguson, J.*]

THIS action was tried at London at the last sittings there, and was then dismissed as against the adult defendant with costs. An oral judgment was delivered in favour of the plaintiff against the infant defendant, but this did not dispose of the matter of costs of the action for or against the infant defendant, and judgment upon this matter was now delivered.

The facts appear in the judgment.

Meredith, Q. C., for the plaintiff.

R. Meredith, for the adult defendant.

Lash, Q. C., for the infant defendant.

FERGUSON, J.—At first it was contended that as this infant defendant had been found to have been guilty of a fraud, or of being a party to a fraud, on his grandfather, he should be ordered to pay the costs of the action, which was occasioned by the fraud. Subsequently, however, Mr. Meredith said that he would not ask costs against the infant defendant, and he asked to have the judgment for the plaintiff for possession of the lands, &c., without costs,

undertaking to submit to a judgment against the plaintiff for the amount of the guardian's costs of defence, if I should be of the opinion that the plaintiff should pay such costs. That judgment was awarded to the plaintiff so that he might get possession of the lands in time to have the full use of them during the present season, but this was upon the understanding aforesaid.

Authorities were referred to for the purpose of shewing that the infant defendant was not only not entitled to costs, but that he was liable to pay costs. There is no doubt English authority going to shew that an infant defendant who has been guilty of a fraud may be ordered to pay costs, the costs of a suit occasioned by his fraud: *Simpson on Infants*, 463; *Chubb v. Griffiths*, 35 Beav. 127; *Cory v. Gertcken*, 2 Madd. 40. On behalf of the infant defendant, or rather of the statutory guardian who defended for him, I was referred to *Nells v. Graham*, 16 C. L. J. 115, and a case *Hassard v. Hassard*, decided by myself at Walkerton, in which the plaintiff was ordered to pay the guardian's costs, and it was said that many cases had been decided in the same way by the Chancellor and Mr. Justice Proudfoot, but these cases were not named.

In the case *Clements v. Arnold*, 3 Ch. Chamb. R. at p. 76, Mowat, V. C., in delivering judgment said: "In England when a guardian is not named by or at the instance of the infant, the solicitor for the suitors' fee fund is generally appointed guardian by the Court, and his costs must be paid by the plaintiff," (the learned Judge referring to *Morgan's Orders*, 4th ed. p. 577). The report of the case *Nells v. Graham*, is so short that it is not clear that it decides the point now in question. I think, however, that the position in this respect of the statutory guardian here must be considered to bear a strong analogy at least to that of the solicitor for the suitors' fee fund mentioned by Vice-Chancellor Mowat in *Clements v. Arnold*, in a case in England where a guardian is not named by or at the instance of the infant. And I am of the opinion that, according to the present law and practice, the plaintiff in this action must

be ordered to pay the guardian's costs of defence for the infant defendant, although the defence failed and the plaintiff succeeded on the grounds stated in the judgment delivered at the close of the trial.

Plaintiff's counsel having undertaken that a judgment might be entered for these costs, if I should be of this opinion, there will be judgment accordingly, notwithstanding that a judgment has been entered for the plaintiff for possession of the lands.

PURSLEY V. BENNETT ET AL.

Mitigation of damages—Action for malicious arrest—Pleading and evidence—R. 128 O. J. A.

In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour; that the plaintiff was avoiding arrest; that the defendants therefore watched him and when he endeavored to escape detained him until the arrival of the constable, and then gave him into custody; and that the defendants did this in the *bonâ fide* belief that they were justified in thus aiding the arrest.

Held, that although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear upon the record.

[July 10, 1885.—*Rose, J.*]

THIS was an appeal by the defendants from an order of the Master-in-Chambers, striking out from the statement of defence so much thereof as set up facts in mitigation of damages, not otherwise being any answer to the action.

H. J. Scott, Q.C., for the appeal.

Aylesworth, contra.

ROSE, J.—As I understand from counsel the only ground for the judgment was that the statement of these facts was not in accordance with the old practice that damages could not be pleaded to.

I had occasion, in *Livingston v. Trout* and *Wilson v. Woods*, not yet reported, to consider the question as to whether, under Rule 128, O. J. A., and *Scott v. Sampson*, 8 Q. B. D. 491, the old practice was not superseded, and came to the conclusion that where evidence can be given in mitigation of damages notice thereof should appear on the record.

In this case the action is for damages arising from an arrest of the plaintiff by the defendant.

The clauses ordered to be struck out set up in mitigation of damages that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanor, that the plaintiff was avoiding arrest, and the defendants, having heard of his being in the neighbourhood, sent word to the constable, and meanwhile watched the plaintiff; that the plaintiff endeavouring to escape they detained him until the arrival of the constable and gave him into custody, and that all this was done in the *bonâ fide* belief that they were justified in thus aiding in the arrest. This of course is no answer to the action, (see *Matthews v. Biddulph*, 3 Man. & G. at pp. 390, 395,) and it was pleaded only in mitigation of damages.

Possibly under the ruling of Lord Eldon, C. J., in *Watson v. Christie*, 2 B. & P. 224, it might be difficult to give such facts in evidence, but I think the observations of Robinson, C. J., in *Robertson v. Meyers*, 7 U. C. R. at p. 428, are good arguments in favour of receiving them. See also *Moore v. Adam*, 2 Chit. 198.

As in actions for defamation evidence can be given to rebut malice, or as put in *Odgers* on Libel and Slander, p. 302, "the defendant may, in mitigation of damages, give evidence to shew that he acted in good faith and with honesty of purpose, and not maliciously," and in all actions of trespass, evidence may be given in aggravation, I do not see why such evidence as this may not be given in mitigation.

It was strongly argued it could not be given, but it

seems to me the jury should have all the facts before them to enable them to do justice to both plaintiff and defendant.

In the words of Robinson, C. J., in *Robertson v. Meyers*, 7 U. C. R. at p. 428: "Such evidence, it appears to me, could not be properly excluded, inasmuch as it would affect the claim to damages, though it could not go to the right of action."

I think the appeal must be allowed, with costs to the defendant in any event of the cause.

It is clear that if these facts can be given in evidence, it is much better the plaintiff should have full and early notice of the intention to offer them.

DUNCAN ET AL. v. TEES.

Interpleader—Material upon which order granted—Who should be plaintiff in issue when goods seized in claimant's possession.

Interpleader orders should be granted with extreme caution and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession, by an affidavit of the belief of the Sheriff, if he has such belief, and by a similar affidavit of the execution creditor.

A Sheriff, instructed by the execution creditor, went to the store which had been the defendant's, found the claimants in possession and their name over the door, and notwithstanding this, and without further inquiry, made a seizure. Upon a claim to the goods being made, the Sheriff applied for an interpleader order, swearing positively that the seizure was of goods and chattels belonging to the defendant. It was admitted that the defendant had made an assignment of all his property before the seizure.

Held, that an interpleader order should not have been granted, and an order was made barring the execution creditor.

Semble, that if the claimant be in possession at the time of the seizure, the execution creditor should be plaintiff in the interpleader issue.

[July 11, 1885.—*Rose, J.*]

THIS was an appeal by the claimants from an order of the Master-in-Chambers directing an interpleader issue between the claimants and the execution creditors, and making the claimants the plaintiffs.

Shepley, for the claimants (appellants).

Akers, for the execution creditors (respondents).]

Aylesworth, for the Sheriff.

The facts appear in the judgment.

ROSE, J.—Mr. Shepley urged that as the claimants were in possession at the time of the seizure, and had in fact not gone out of possession after the seizure—although the Sheriff kept a man in the store—the execution creditors were the proper parties to be made plaintiffs, relying on the usual practice in Chambers for some years past.

Mr. Aylesworth stated that his recollection of the practice was the same as Mr. Shepley's.

Mr. Akers contended that the practice as reported in England and Canada was to make the claimant plaintiff.

Mr. Akers may be right in so stating. I have not very carefully examined all the decisions, as it seems to me the case must be decided on another ground, but I certainly think the practice as it is reported to have existed in Chambers of late years is the correct one.

In *Ogden v. Craig*, 10 P. R., at p. 382, I called attention to the remarks of Platt, B., in *Day v. Carr*, 7 Ex., at p. 887, as to the impropriety of a Sheriff seizing the goods of A. under an execution against B.

Surely it would be a cruel thing to allow the Sheriff at the mandate of an execution creditor to go to one man's house and make a seizure of his goods and chattels in his possession under an execution against another man; and when the person out of whose possession the Sheriff takes the goods claims them then for the Court to make an interpleader order at the instance of the Sheriff, call upon the claimant to prove title to his goods, give security for their forthcoming, or in default direct his goods to be sold, and for him to be obliged to accept what might be realized, or possibly be involved in dangerous and expensive litigation.

It is manifest that interpleader orders should be granted

with extreme caution, and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession, by an affidavit of the belief of the Sheriff, if he has such belief, and by a similar affidavit of the execution creditor.

It seems to me if the debtor be not in possession, but the claimant, the execution creditor should be put to the burden of shewing his right to interfere, should be made plaintiff, and the form of the order should leave no doubt as to the issue being as to his right to seize.

It may be the practice has been, as Mr. Akers contends, the other way. I sincerely hope it is not so firmly established as to prevent the course I suggest being followed. In *Merchants Bank v. Herson*, 10 P. R. 117, the execution creditor was made plaintiff, and the claimant defendant.

In *Day v. Carr*, it is laid down that the fact of the ownership of the debtor must appear or the order cannot be granted.

I observe in this case that the Sheriff makes an affidavit in positive terms that the seizure was of "goods and chattels belonging to the defendant." This, as will appear, was not the fact, and his counsel has been notified that I require an affidavit from the Sheriff as to his knowledge to enable me to determine as to his costs of this application.

I again direct attention to the strong language of Mr. Baron Platt, in *Day v. Carr*, 7 Ex. 883, where the Court refused to protect the Sheriff as against a claimant, who re-took his own goods. The learned Judge said, at p. 887: "Now the claimant is called upon to answer why an attachment should not issue against him for doing a lawful act, an act which is not a contempt of Court, but a contempt of the officer *abusing the process of the Court*, by seizing the goods of one person under a writ against another."

There is no necessity or excuse for such a course. An order may be obtained without seizure, if there is a *bonâ fide* intention to seize, and the Sheriff makes out a proper case for the interference of the Court. See *Ogden v.*

Craig, supra, as to when such an application will not be granted.

It will not be forgotten that sheriffs in no wise enlarge their powers by taking indemnity, and if upon an attempt to do an illegal act they should suffer personal injury from the violence of those whose homes or buildings they attempt to enter, or whose property they attempt wrongfully to take, they may find themselves without redress. *Smith v. Critchfield*, 14 Q. B. D. 873, may be referred to as to the protection afforded to sheriffs, where there is a mere trespass without injury. In that case there was no active resistance by the claimant.

In this case it appears that the execution creditor's solicitor wrote to the Sheriff to "at once seize the stock in the store of David Tees, jr. If any claim is made thereto by Wm. Kyle or by one O'Donnell, kindly interplead at once."

The Sheriff went to the store, found the defendant not in possession, but Kyle & Co., by their agent, and Kyle & Co.'s names over the door. Notwithstanding this, and without further enquiry, he, pursuant to his instructions, placed a man in possession, and then, having received a letter from Kyle & Co.'s solicitors, made the affidavit referred to.

When the appeal came on for argument, I intimated an intention to vary the order. Thereupon the counsel for the execution creditors at once plainly stated that, if I made his clients plaintiffs and varied the form of issue so as to compel them to shew their right to seize the goods, they would be unable to do so, as before the Sheriff had seized under their execution the defendant had made an assignment to Clarkson. He further stated that he was claiming the goods in Clarkson's interest for the benefit of the creditors, and took this course to obtain any advantage against the claimants that the execution might give.

It thus appeared that at the time the seizure was made the goods were not the defendant's, but belonged to either Kyle & Co. or Clarkson, and that it was sought in this

proceeding to make Kyle & Co. prove their title as against the execution creditors, who, by their own admission, had no claim to the goods; and if Kyle & Co. could not as against the execution creditors hold the goods, then the assignee was to obtain the benefit of the issue. In other words, a stranger to the title to the goods desired to intervene and fight Clarkson's battle as against a rival claimant. I did not think this the object of the Interpleader Act, and by admission the very basis of the motion was wanting, namely, the ownership of the goods by the debtor, without evidence of which the Court in *Day v. Carr*, 7 Ex. at p. 886, held the order could not go.

Being much pressed by Mr. Akers I granted an enlargement to enable him, if so advised, to bring Clarkson before the Court with a view to make some order, if possible, to determine the rights of the parties. Upon the return he deemed it best not to bring him before the Court, probably fearing an order somewhat similar to that made in *Merchants Bank v. Herson*, 10 P. R. 117, where the execution creditor was made plaintiff, and the assignee and other creditors defendants, and the form of issue was directed to be "whether the claimants or any, and if any, which of them had the right to the goods as against the Merchants Bank." On such an issue in this case it would be found that Clarkson and, it may be, Kyle & Co., or one or the other, had the right as against the execution creditors, and then Clarkson and Kyle & Co. would be left to settle their claims between themselves. In *Merchants Bank v. Herson*, the learned Chief Justice added, at p. 121, "If all the claimants," by this I understand all or any of the claimants, "have the better title as against the Merchants Bank, the Judge would not, under that issue try the title between the claimants themselves. The claimants might settle these rights between themselves, the purpose of the issue having been answered by *its being settled that the execution creditor is not to have his execution satisfied out of the goods which were seized by the sheriff.*"

The learned Chief Justice refused to give effect to the contention that the assignee and the execution creditor were in the same right. He held that the assignee was an adverse claimant, and that if the execution creditor acknowledged his right, there should be an end to the interpleader proceedings. He said, "If the Merchants Bank waive their claim as against Clarkson, they should be barred, and further proceedings will be unnecessary."

As this case appears before me it is clear by the statement of counsel that the goods in question were not at the time of the seizure the goods of the defendant, and but for the erroneous statement in the Sheriff's affidavit the order could not have been made.

The execution creditors should be barred, and further proceedings thus become unnecessary.

The claimants should have their costs paid by the execution creditors. I reserve the question as to the Sheriff's costs until after I have an affidavit from him explaining as to how he made the affidavit to found the application for the order, when the question may be spoken to if counsel desire.

I will hear counsel as may be appointed, say, between the first and tenth of September, prior to the Fall sittings.

It may be in strictness the claimants are entitled to have the interpleader order rescinded. This may be spoken to at the same time.

As the fact of the assignment appeared from the statement of counsel, and does not appear on the affidavits, it should be recited in the order.

PAWSON ET AL. V. THE MERCHANTS BANK OF CANADA ET AL.

Jury notice — Rule 545—Transferring causes — Exclusive Jurisdiction of Chancery.

In an action brought in the Chancery Division, on behalf of the plaintiff and other creditors, to set aside an alleged fraudulent transfer of notes, &c., made to the defendants by the debtor, and for an injunction to restrain the defendants from negotiating them, the defendants served a jury notice, which the Master-in-Chambers refused to strike out. On appeal to PROUDFOOT, J., he allowed the appeal and struck out the notice, reserving leave to appeal to the Court of Appeal.

Held, that Rule 545, O. J. A., was not intended to, and does not, interfere with the power of transferring actions from one Division of the High Court to another, nor with the right to give a jury notice in a proper case, nor with the existing modes of trial of particular actions.

Held, also, that the exclusive jurisdiction of the Court of Chancery in sec. 45 means its jurisdiction as exercised generally in dispensing equity, and not its exclusive as distinguished from its auxiliary jurisdiction.

Held, lastly, that this was such an action as would, before the Judicature Act, have been within the exclusive jurisdiction of the Court of Chancery, and therefore it fell within sec. 45, and should be tried without a jury.

The practice as laid down in *Bank of B. N. A. v. Eddy*, 9 P. R. 468, is still the proper practice.

The question whether the order of PROUDFOOT, J., was appealable was not determined, as the appeal was dismissed.

[May 12, 1885.—*The Court of Appeal.*]

THIS was an action begun on the 23rd December, 1884, (after the passing of Rule 545, O. J. A.), by writ issued out of the Chancery Division, by the plaintiffs, Pawson & Co., on behalf of themselves and all others the creditors of the defendants, Watson and Young, to declare void the delivery of certain promissory notes and cheques by the said Watson and Young to their co-defendants, and to restrain the negotiation, &c., of the notes.

The statement of claim alleged that the defendants delivered the notes and cheques pursuant to a fraudulent scheme and conspiracy entered into by them for the purpose of enabling the defendants, Watson and Young, to transfer their assets to their co-defendants with intent to give them a preference over the plaintiffs and other creditors.

Notices requiring a trial by jury were filed and served by some of the defendants.

The plaintiffs applied to the Master-in-Chambers, to strike out the jury notices, but he refused to do so, and they appealed to a Judge in Chambers from the Master's order dismissing their application.

PROUDFOOT, J., on the 13th of May, 1885, made an order allowing the appeal and setting aside the jury notices, following the decision of Boyd, C., in *Masse v. Masse*, 10 P. R. 574, then recently decided. (See, however, *Masse v. Masse*, *post* p. 81.)

By the order of Proudfoot, J., leave to appeal therefrom direct to the Court of Appeal was reserved to the defendants.

Robinson, Q. C., Hoyles, and Wallace Nesbitt, for the appellants, contended: 1. That the order in question was appealable under secs. 35 and 36, O. J. A.. 2. That this action was not one over which the Court of Chancery had, at the time of the passing of the O. J. A., exclusive jurisdiction, but was substantially a common law action. 3. That *Masse v. Masse*, 10 P. R. 574, was wrongly decided; that Rule 545, O. J. A., had not the effect of throwing the *onus* upon the party desiring a jury in an action of a common law character, merely because it was assigned by chance under that rule to the Chancery Division; referring to the following cases: *Re Freeman et al.*, 2 E. & A. 109; *Masse v. Masse*, 10 P. R. 574; *Bank of British North America v. Eddy*, 9 P. R. 468; *Bingham v. Warner*, 10 P. R. 621; *West v. White*, 4 Ch. D. 631.

Shepley, for the respondents. The action is one of a purely equitable nature; it could not, before the O. J. A., have been brought in a common law court. The remedy the respondents are asking is an equitable one; if they have a common law right of action, they are not asserting it here, and it does not come in question. This is not an appealable matter, being merely interlocutory in its nature. The discretion of a Judge of the Court in which the action is to be tried, as to the mode of trial, will not be inter-

ferred with by an appellate court. Even if this were a common law action, *Masse v. Masse* was well decided and should govern: *Gowanlock v. Mans*, 9 P. R. 270; *Thurlow v. Beck*, 9 P. R. 268; *Vermilyea v. Guthrie*, 9 P. R. 267; *Bryan v. Mitchell*, 8 P. R. 302; *Usil v. Whelpton*, 45 L. T. N. S. 39; *Cardinall v. Cardinall*, 25 Ch. D. 772; *Back v. Hay*, 5 Ch. D. 235; *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127.

Robinson, Q. C., in reply. This is not a case, even as framed, which was within the exclusive jurisdiction of the Court of Chancery. The exclusive jurisdiction includes charities, trusts, &c. This case, as framed, comes within the auxiliary jurisdiction of Chancery; we must look, however, not at the form but at the substance, and the action is in effect a common law one; *Ross v. McLay*, 40 U. C. R. 83, 87.

PATTERSON, J. A.—The complaint of the defendants who appeal is, that their jury notice has been struck out. I am of opinion that the course was proper, because the action is one of the “causes and matters over which the Court of Chancery had, at the time of the passing of the Judicature Act, exclusive jurisdiction,” and therefore the mode of trial must, under section 45, be according to the practice of the former Court of Chancery.

The argument against this application of section 45, though presented in a variety of ways by the learned counsel for the different appellants, may, I think, be not unfairly stated as not suggesting that by any proceeding at common law, or in a common law court under our legislation before the Judicature Act, the relief could have been obtained which is sought in this action; but as insisting that something might have been done by the plaintiffs, either under their judgment or in some other way, which would have been as beneficial to them as the decree they now ask for.

Without speculating as to how far the plaintiffs could have gone, or what they would have achieved, if they had

been advised to resort only to such means as were formerly available in courts of common law, it is sufficient to notice that section 45 deals with the mode of trial in actions actually pending.

The question is, what is the mode of trial for this action; not whether the plaintiffs' end might have been attained in a different action, or without any action; and the test given by the section is whether or not this action is a cause or matter over which the Court of Chancery had exclusive jurisdiction, which I understand to mean, could the action have formerly been maintained in any court but the Court of Chancery?

It is clear that it could not.

This feature, which was not present, so far as we are informed, in *Masse v. Masse*, leads to the same result in the matter of the disallowance of the jury as in that case, without making it necessary to decide the question touching the effect of the recent Rule No. 545.

I have, however, no objection to express my opinion that the right to have issues tried by a jury is in no way affected by that order. Before it was passed every plaintiff had unrestricted liberty to begin his action in the Chancery Division, or in one of the common law divisions of the High Court, and we know that in practice suitors often resorted to the Chancery Division, when before the Judicature Act they would have been confined to a common law court. The same class of cases may find their way into that division in larger or smaller numbers under the new rule, but when there they are on precisely the same footing as formerly.

It may not be out of place to remind litigants that the Judicature Act does not recognize any mode of trial as peculiar to the Chancery Division; and that what may be a popular misconception to the contrary probably arises from the circumstance, which with reference to this topic is an accidental circumstance, that in more than half the counties in the Province separate sittings have, up to this time, been held for the trial of actions pending in the Chancery Division.

As we have to dismiss the appeal, it is unnecessary to determine the question whether the order is properly appealable.

BURTON, J. A.—I agree in the result, being of opinion that this case comes fairly and properly within section 45, as “one of the causes and matters over which the Court of Chancery had, at the time of the passing of the Judicature Act, exclusive jurisdiction.”

I am unable to see how the plaintiffs could have sought the relief which they seek in this action in any other Court than the Court of Chancery.

I am not prepared to say that the plaintiffs might not have sustained an action for damages in what was formerly called an action on the case, if they could have established that the defendants had fraudulently combined together for the purpose of removing property which was liable to be seized under the plaintiffs’ judgment and execution, and had so fraudulently removed it so as to prevent them enforcing their execution. On the contrary, I have no doubt upon general principles, that such an action would lie, and I fully concur in the argument of the appellants’ counsel, that where it is clear that the action is one of a purely common law character, the plaintiff cannot clothe it in an equity garb, and thus deprive the defendant of his right to give a jury notice; but I am of opinion that the relief sought in this action by one person as a member of a class seeking to have certain transactions and payments set aside, and the funds brought into court with a view to distribution among that class, was only obtainable in equity at the time of the passing of the Judicature Act, and should be tried therefore as cases were at that time dealt with by the Court of Chancery.

I may add that it never was the intention of the Supreme Court in passing Rule 545 to alter in any way the existing practice, but merely to equalize if possible the business in the several Divisional Courts; and I cannot subscribe to the opinion that its language indicates that

any change has been thereby effected as to the right of a litigant to a jury in any case in which he was so entitled before the passing of that Rule, and that a Judge ought to be satisfied in such case that sufficient and proper reasons exist for depriving a party of his *prima facie* right to have his case disposed of by a jury—a power now vested in the Judges, but which I have always thought was one to be exercised with great caution, the *onus* being upon the party who wishes to deprive his opponent of the right.

I agree, for the reasons mentioned, that this appeal should be dismissed, with costs.

OSLER, J. A.—Rule 545 of the R. S. C. of the 15th December, 1884, was passed, as expressed in its preamble, for the purpose of equalizing the business in the several divisions of the High Court.

It does not profess, and was not intended, to interfere with the power of transferring a cause from one division of the High Court to another, nor does it profess, nor was it intended, to interfere with the existing modes of trial of particular actions. I lay no stress, however, as regards the language of the rule, upon the intention of those who, like myself, are responsible for its form. If its meaning is what has been contended for, effect must be given to it as a matter of construction.

With great respect, I am of opinion that the rule does not by implication, and, as I have said, it does not expressly, amend, modify, or repeal section 45 of the Judicature Act, which expressly enacts that, subject to rules of court, the mode of trial in causes and matters, which, at the time of passing of the Act, were within the jurisdiction of the courts of law, should be as was then provided for like cases in actions in the Queen's Bench and Common Pleas, and in causes and matters over which the Court of Chancery then had exclusive jurisdiction should be according to the then practice of that Court. The evil which the rule was intended to remedy was the great disproportion-

tion which had for some time existed and appeared to be increasing, between the business of the Chancery Division and that of the other two divisions of the High Court, largely caused by the bringing in the former division of actions which might more properly have been brought in the latter. Applications at the instance of the parties to transfer a cause from one division to another were comparatively rare, and it was practically impossible for the Judges, except occasionally at the head office, to equalize the business by spontaneously directing a transfer of causes at a convenient stage of the suit. It was considered that the immediate effect of the proposed rule, making every allowance for successful attempts to evade it, would be, to some extent, to equalize the business, and to make it necessary for the parties to move to transfer a cause, if for any reason it could not be conveniently prosecuted in the Chancery Division, the unnatural preference for which, if I may say so without disrespect for our learned Brothers of that division, it was assumed would continue to exist.

I think, therefore, that the right of the suitor to give a notice for a jury has not been affected by Rule 545, and that the practice still is, as the learned Chancellor held it to be, in *The Bank of British North America v. Eddy*, 9 P. R. 468.

The result is, that when a jury notice has been given in a proper case in the Chancery Division, the action must be transferred on the motion of the parties to one of the other Divisions, unless the Court or Judge thinks proper as a matter of discretion to dispense with a jury, the *onus* of satisfying the tribunal that such discretion ought to be exercised being on the party objecting to the notice.

The question still remains, whether the judgment appealed from may not be supported on the ground that the action is not one in which, under section 45, either party had the right to a jury, it being "a cause or matter over which, at the time of the passing of the O. J. Act, the Court of Chancery had exclusive jurisdiction." This question must, I think, be answered adversely to the

appellants. It was ingeniously argued that the word "exclusive," was used in the technical sense in which text writers have sometimes used it in treating of the equitable jurisdiction of the Court of Chancery, for the purpose of distinguishing that branch of it which dealt with the administration of assets, trusts, charities, &c., from that which was invoked in aid of proceedings at law, &c. I see no sound reason for accepting this suggestion. The language of the section is, "causes and matters over which the Court of Chancery * * has * * exclusive jurisdiction." What is referred to is the *forum* in which certain classes of action must have been brought, and as regards that the jurisdiction of the Court of Chancery was exclusive, whether the equity sought to be administered was exclusive or auxiliary.

In this action the plaintiffs sue on behalf of themselves and all other creditors of the defendants, Watson and Young, to set aside, as fraudulent and void, a transfer of certain notes and cheques of one Struthers to the other defendants, and for an injunction to restrain those defendants from negotiating or dealing with the securities. It is alleged that such transfer was made in pursuance of a conspiracy and fraudulent arrangement between the defendants to defeat the plaintiffs and other creditors of their just debts. The question is, whether the specific relief here sought—that for which the action is brought, and which the plaintiffs shew themselves entitled to—is of that character which could formerly only have been obtained in the Court of Chancery? I think it is. It is certainly novel to me that such proceedings could ever have been taken in a court of law.

It cannot, I think, aid the defendants to argue that on the plaintiffs' execution on the judgment at law, they might have obtained what they are seeking to obtain in this suit and more, or that on the facts the plaintiffs allege they might have maintained what would formerly have been called an action on the case for conspiracy to defraud, &c: *Young v. Buchanan*, 6 C. P. 218. The answer, is that

the plaintiffs are not taking either of those courses, but are pursuing a distinct remedy which they must, when the Judicature Act was passed, have pursued only in the Court of Chancery.

Having thus, for the satisfaction of the parties, expressed an opinion on two of the points involved in the appeal, it becomes unnecessary to consider whether the case is one in which an appeal lies. I do not desire to be understood as having expressed any opinion in favor of the contention that the order is an appealable one under any circumstances. I simply express no opinion.

HAGARTY, C. J. O., concurred.

Appeal dismissed, with costs.

MASSE V. MASSE.

Action in Chancery Division—Jury notice—Transferring action.

The order of *Boyd, C.*, 10 P. R. 574, reversed by the Divisional Court, following *Pawson The Merchants Bank*, ante p. 72.

[September 3, 1885—*The Chancery Division.*]

AN appeal by the defendant from the order of *Boyd, C.*, of the 20th April, 1885, (10 P. R. 574), striking out the defendant's jury notice, and refusing to transfer the action from the Chancery Division to one of the other divisions.

W. H. P. Clement, for the appeal, cited *Pawson v. Merchants Bank* (ante p. 72), decided in the Court of Appeal on the 12th May, 1885, where it was held that Rule 545, O. J. A., has not altered the rule that in an action of a common law character the *onus* is upon the party who desires to be rid of the jury notice; and *Herring v. Brooks*, 11 P. R. 15.

J. C. Hamilton, contra, cited *Gardner v. Jay*, 29 Ch. D. 50.

Boyd, C.—*Gardner v. Jay* is not applicable, as the English rules are different from ours. I think no reason has been shewn for inducing us to strike out the jury notice, since, following *Pawson v. Merchants Bank*, we must hold that the *onus* is upon the plaintiff, who wishes to have the jury notice struck out. When I decided this case in Chambers, I thought I was bound by Rule 545 to retain the action in this Division, unless some strong reason for removing it was given, in order as much as possible to equalize the business of the three Divisions; but as the Court of Appeal has held otherwise, and as this is an action of a common law character, the *onus* is upon Mr. Hamilton, and that *onus* he has not displaced. There is no equitable issue here, and the complexity of facts is not of itself a reason for striking out the jury notice.

PROUDFOOT, J.—I concur in the judgment. There is nothing here which takes the case out of the rule laid down by the Court of Appeal in *Pawson v. Merchants Bank*. This is an action of ejectment, no equitable questions are involved, and the defendant has therefore a right to a jury.

FERGUSON, J., concurred.

Appeal allowed, order striking out jury notice set aside, and order made transferring the action to another division. Costs of the motions in chambers to be costs in the cause, and costs of this appeal to be to the appellant in any event of the cause.

MORTON V. HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgage—Sale under power—Surplus—Account as to—Scale of costs—R. 515, O. J. A.

The order of PROUDFOOT, J., 10 P. R. 636, affirmed by the Divisional Court.

[September 3, 1885—*The Chancery Division.*]

AN appeal by the defendants from the order of Proudfoot, J., reported 10 P. R. 636.

Muir, for the appeal, referred to R. 515, O. J. A.; C. S. U. C. ch. 15, sec. 34 sub-sec. 8: *Banning* on Limitations, 187; *Re Kirkpatrick*, *Kirkpatrick v. Stevenson*, 3 O. R. 361 at p. 368; *Cholmondeley v. Clinton*, 2 J. & W. 1; *School Trustees of Stephen v. Mitchell*, 29 U. C. R. 382; *Boulton v. Rowland*, 4 O. R. 720; *Carden v. The General Cemetery Co.*, 5 Bing. N. C. 253.

Watson, contra, referred to R. S. O. ch. 43, sec. 19; *McGillicuddy v. Griffin*, 20 Gr. 81; *Beatty v. O'Connor*, 5 O. R. 731, 747.

BOYD, C.—It cannot be argued that this case does not come under the term “equitable relief” in C. S. U. C. ch. 15, sec. 34, for mortgagees and mortgagors are specially included in that section by sub-sections 6 and 7. I have no manner of doubt that the proper conclusion was arrived at in this case. The same construction was put upon the Act in *McGillicuddy v. Griffin*, 20 Gr. 81, and here we have the decision of a skilled taxing officer upheld in a considered judgment by my Brother Proudfoot. Looking at the merits of the case, it was a complicated one; there were two appeals from the Master and a reference back was twice directed. As a difficult case involving complicated accounts it would seem a proper one for the higher court.

PROUDFOOT and FERGUSON, JJ., concurred.

Order affirmed with costs.

BULL V. THE NORTH BRITISH CANADIAN LOAN AND INVESTMENT COMPANY (LIMITED) ET AL.

Order made at trial—Judge in Chambers—Res judicata—Jurisdiction of Divisional Court—O. J. A. sec. 28, sub-secs. 2, 3—R. 254.

The action came on for trial at the Toronto Assizes, but the trial was postponed, and Armour, J., endorsed on the record: “Upon my own motion I order that the place of trial in this cause be changed to the town of Belleville, and that this cause be tried at the next Assizes there by a jury.”

Rose, J., sitting in Chambers, had previously refused to change the place of trial to Belleville.

Held, that the question of place of trial was *res judicata*.

Held, also, notwithstanding sec. 28, sub-secs. 2 and 3, O. J. A. that the Divisional Court had jurisdiction to hear an appeal from the order of Armour, J., having regard to the language of Rule 254, O. J. A., and of the order itself.

Semble, Rule 254 does not give a Judge a right to interfere with the procedure in the action, except at the instance of a party.

[September 5, 1885.—*The Common Pleas Division.*]

THIS was an appeal by the defendants from an order made by Armour, J., under the circumstances set forth in the judgment.

Urquhart, for the defendants the Loan Company.

Wallace Nesbitt, for the defendants the Insurance Company.

Millar, for the plaintiff.

CAMERON, C. J.—This is a motion by way of appeal from an order made by my learned brother Armour, at the last sittings of the High Court of Justice for the trial of civil causes at Toronto, changing the place of trial of the action from Toronto to Belleville.

In the original statement of claim the plaintiff had selected Toronto as the place of trial, and on application to my learned brother Rose to change the place of trial to Belleville, he declined to do so, and made an order dismissing the plaintiff's application (a).

This was the position of the matter when an application to the learned Judge at the above sittings to postpone the trial till the next sittings of the Court, was made on behalf of the defendants, which application was granted and an order was endorsed on the copy of the pleadings filed with the Clerk of the Court, postponing the trial accordingly.

Following this order and endorsed on the pleadings was the order now moved against, in the following words: "Upon my own motion, I order that the place of trial in this cause be changed to the town of Belleville, and that the cause be tried at the next assizes there by a jury."

The order was not made on motion of or at the request of any of the parties to the suit. The defendants the Imperial Fire Insurance company have moved by way of appeal to rescind this order, on the ground that the matter was *res judicata*, by reason of the dismissal of the motion to change the place of trial made by my learned brother Rose, and there was no motion or application before the learned Judge on which he could act, and a Judge has not the right, of his own mere motion, to change the place of trial.

On behalf of the plaintiff it is contended, that, whether there was material before the learned Judge or not, he was sitting as a Court, and no appeal will lie from the High Court, sitting for the trial of causes in a matter like the present, to the Divisional Court; but the parties dissatisfied must seek relief from the Court of Appeal. I think this contention would be well founded if it were not for the express provision on the subject, contained in rule 254 of the Judicature Act.

There is no doubt under section 28, sub-sections 2 and 3, a Judge sitting elsewhere than in Chambers, or in a Divisional Court, constitutes a Court, and that an appeal does not lie to the Divisional Court, except in the cases expressly provided for under rules 471 and 510 of the Judicature Act, from such Court; the appeal being given by section 37 to the Court of Appeal.

But rule 254 provides: "There shall be no local venue for the trial of any action except an action of ejectment, but the plaintiff shall in his statement of claim name the county town in which he proposes that the action should be tried, and the action shall, unless a Judge otherwise order, be tried in the place so named. Any order of a Judge, as to such place of trial, may be discharged or varied by a Divisional Court of the High Court."

It is not necessary to enquire on the present motion whether this rule excludes the jurisdiction of a Divisional Court to order a change of the place of trial in the first instance or not, or whether, if it could, the same power is given to a Court constituted by one Judge, as in the present case the learned Judge does not assume, having regard to the language of his order, to have acted as a Court, but as a Judge, under the said rule 254. I am, therefore, of opinion the appeal lies.

It cannot, I think, have been intended by said rule to give a Judge a right to interfere with the procedure in the action, except at the instance of a party thereto.

The costs of this motion to be costs in the cause to the successful party.

In support of the contention that in the absence of rule 254 the only right of appeal would be to the Court of Appeal, the very recent decision of the English Court of Appeal in *Mellor, Cunningham, & Co. v. The Royal Exchange Shipping Co.*, reported in the Weekly Notes of 15th August, 1885, at page 172, may profitably be considered, as well as the cases cited on the argument of *In re Galerno and the Corporation of Rochester and Grant v. McAlpine*, 46 U. C. R. 379.

GALT and ROSE, JJ., concurred.

LONDON AND CANADIAN LOAN AND AGENCY COMPANY V.
MORPHY.

*Interpleader issue—County Court—Motion to postpone trial—44 Vic.
ch. 7, sec. 1, (O.)*

An interpleader issue arising out of an action in the High Court of Justice was directed to be tried in a County Court pursuant to 44 Vic. ch. 7, sec. 1, (O.)

Held, that a motion to postpone the trial of the issue should have been made in the County Court.

[September 9, 1885.—*The Master-in-Chambers.*]

AN order made in Chambers, in an action in the High Court of Justice, directed the trial of an interpleader issue in the County Court of the County of York, at the then next sittings of the Court.

G. W. Meyer, for the claimant, moved to postpone the trial of the issue till the following sittings.

Howland, Arnoldi, & Ryerson, for the execution creditors, objected that the motion should have been made in the County Court, instead of the High Court.

THE MASTER-IN-CHAMBERS. — It is objected that this motion to put off the trial should have been made before the learned Judge of the County Court, and I agree, upon consideration, that it is so.

The statute of 1881, 44 Vic. ch. 7, sec. 1 (O.), provides that where the goods seized on an execution are under \$400 in value—which is the case here—"the order directing an (interpleader) issue to be tried may direct that the issue shall be drawn up and tried in the County Court of the county in which the issue would, under section 22 of the Interpleader Act, be tried, and in such case the issue shall be drawn up and tried in the County Court, and all subsequent proceedings therein, up to and inclusive of judgment and execution, shall be had and taken in the County Court, which shall have jurisdiction in the premises as fully as though the writ of execution or attachment had issued out of a County Court." So that the issue is to be "drawn up," as well as tried, in the County Court.

It must be recollected that the object of the Act was to lessen the costs in cases of small amount, and so to prevent proceedings in the higher Court, while it authorized such proceedings in the County Court. This is not merely the sending an issue to be tried in the County Court. The statute enacts much more, for the order which it authorizes really transfers the proceedings from the higher Court to the County Court, from the completion of the order for the issue, until judgment and execution.

Viewing the nature of the proceedings and the obvious intention, the words "all subsequent proceedings" must mean all proceedings from the completion of the order sending the issue to the County Court until final judgment, for the issue, as I have said, is to be drawn up in the County Court, and there the case is to go on until final judgment.

Then the case is sent down to a Court of record for trial in due course of law, and, as all subsequent proceedings are to go on there, all those discretionary powers must be given to the County Court necessary for a fair and just trial, and a motion, therefore to put off the trial on account of the absence of a witness must be made in the County Court—I mean the jurisdiction to hear such a motion must be there. Suppose it were necessary to move for a new trial

for the same cause, that motion must be made in the County Court, for the words of the statute are peremptory, that all proceedings to final judgment *shall* be had and taken in the County Court.

I distinguish this case altogether from the case where a mere issue is sent down to be tried.

There was a motion in this case made in this Court since the order for the issue, and heard by his Lordship Mr Justice O'Connor. I do not imagine that I am deciding against his view, as I understand the motion before his lordship turned upon the terms of the original order, and that the decision was not within the reasons I am acting on.

However, from that case, and the difficulty of the matter, I think I ought to discharge the motion without costs.

HICKEY V. STOVER.

Divisional Court—Appeal to—Time—Rules 522 and 523, O. J. A.

The judgment at the trial was pronounced on the 19th June, 1885, but was not drawn up and settled till the 11th September. The sittings of the Chancery Divisional Court (to which the defendant wished to appeal) began on the 3rd September.

Held, that the time for appealing under Rule 523, began to run from the 19th June, and that it was not extended by the neglect to draw up the judgment, although, as the judgment was not drawn up, the cause could not be set down under Rule 522.

But, as there was a *bonâ fide* intention to appeal, instructions had been given, the defendant lived abroad, in Texas, the judgment was complex, and there were only twelve days exclusive of vacation during which it could have been settled, leave to set the cause down was granted on payment of costs.

[September 11, 1885.—*The Chancery Division.*]

JUDGMENT was pronounced by Ferguson, J., at the trial upon the 19th of June, 1885, but the plaintiff did not procure the judgment to be settled and passed before the long vacation, and it was too late after vacation to have it settled in time to enter it for rehearing at the next sit-

tings of the Chancery Divisional Court, which began on the 3rd September, 1885 ; rule 522, O. J. A., requiring an appeal to the Chancery Divisional Court, to be set down seven days before the sittings ; and rule 523 requiring every application to the Divisional Court to change or reverse any judgment to be made at the first sittings of the Divisional Court which begins not less than ten days after the pronouncing of the judgment. The rule observed by the direction of the Judges is that no cause is to be set down to be heard before the Chancery Divisional Court until the judgment or order appealed from has been drawn up and settled.

J. Maclellan, Q.C., for the defendant, moved for leave to set this action down to be heard by way of appeal from the judgment of *Ferguson, J.*, (the judgment having this day been drawn up and settled), notwithstanding the lapse of time. He cited *O'Sullivan v. Harty*, 5 C. L. T. 275.

Matthew Wilson, for the plaintiff, contra, cited *Rumohr v. Marx*, 19 C. L. J. 10 ; *Shupe v. Shupe*, 4 C. L. T. 129 ; *Re Pilcher*, 11 Ch. D. 905 ; *Re New Callao*, 22 Ch. D. 484 ; *Re Manchester Economic Building Society*, 24 Ch. D. 488 ; *Whistler v. Hancock*, 3 Q. B. D. 83 ; *King v. Davenport*, 4 Q. B. D. 402 ; *Collins v. Paddington*, 5 Q. B. D. 368.

THE COURT was of opinion that the case in the Supreme Court, (*O'Sullivan v. Harty, supra*), did not apply, as the language of the Supreme Court Act was different ; that the time for appealing under Rule 523 ran from the 19th of June, the day judgment was pronounced, and that the neglect to draw up the judgment, which made it impossible to set the cause down, did not extend the time for appealing. The Court, however, thought that the special circumstances of the case were such that leave ought to be granted. There was a *bonâ fide* intention to appeal, instructions had been given, the client lived abroad, in Texas, the judgment pronounced was of some complexity, and there were only twelve days before

vacation during which it could have been settled otherwise than by consent, and the same diligence could not be expected or required in vacation as at other times. The leave was granted on payment of the costs of the application.

RE ROGERS—ROGERS ET AL. V. ROGERS ET AL.

Master's Office—Jurisdiction—G. O. Chy. 640—Reference under order of Master-in-Chambers—Disputed lease—Fraud—Trial of issue—Rule 256, O. J. A.—Who should be plaintiff.

Held, that on a Chamber reference for partition or sale of lands made by the Master-in-Chambers, the Master-in-Ordinary has no jurisdiction to try the question of the validity of a lease under seal from the intestate, set up as a ten years' lease by one of the heirs-at-law, who claimed that the lands should be sold subject to his lease, some of the other heirs-at-law disputing the validity of the lease, and alleging that it was either a five years' lease, or that there had been a fraudulent alteration of the sealed instrument, there being an alteration in a material part apparent on the face.

The reference was adjourned till after the trial of the question raised, and an issue was directed by a Judge in Chambers under Rule 256, O. J. A., to be tried at the next sittings for the trial of actions in the Chancery Division; the lessee to be plaintiff in the issue.

[September 18, 1885—*The Master-in-Ordinary.*]

[September 21, 1885—*Ferguson, J.*]

UPON a summary application under G. O. Chy. 640, the Master-in-Chambers made an order for the partition or sale of the lands of one Timothy Rogers, who died intestate, and referred it to the Master-in-Ordinary to make partition or sale after the usual accounts and inquiries.

Under a direction to shew what incumbrances there were upon the lands, the defendant Henry Rogers, one of the sons and heirs-at-law of the intestate, who was a party to the application to the Master-in-Chambers for the partition order, but did not oppose it, brought into the Master's office an indenture of lease, purporting to be executed by the intestate in April, 1880, in favour of the said defendant

and granting him, as he claimed, a term of ten years in the lands ordered to be partitioned or sold, the term beginning in 1880 and not expiring till 1890. The defendant Henry Rogers asked that the lands should be sold subject to his lease. The rent reserved was \$450 a year, and the value of the land was sworn to be about \$12,000.

It was admitted that there had been an alteration in the part of the lease which expressed the term, the word "five" having been evidently written at one time in the blank left for the term in the printed form which was used, whether before or after the word "ten," which had also evidently been written there. If the lease was a five years' lease it had, of course, now expired.

Sarah Ann Todd, Mary Brimson, and Elizabeth Norman, daughters of the intestate, who were made parties in the Master's office, as heiresses-at-law, appeared by counsel and disputed the validity of the instrument as a lease for ten years. An affidavit of Sarah Ann Todd was filed, in which she stated her belief that her father had never executed a lease of the lands in question to Henry Rogers for the term of ten years, and that if the word "ten" was the last one written, or if "five" had been altered to "ten," the same had been fraudulently written or altered.

Morgan, for the plaintiffs and Henry Rogers.

Harcourt, for the infant defendants.

E. B. Brown, for the defendants who contested the validity of the lease.

THE MASTER-IN-ORDINARY held that under a Chamber reference of this character, made by an order of the Master-in-Chambers, the tribunal known as the "Master's Office," had no jurisdiction to try the question of fraud raised; and he therefore adjourned the reference until the question whether the lands were to be sold free from or subject to the lease, which involved the other question of the validity of the lease, should be determined by a competent tribunal.

Shepley, for the plaintiffs and the defendant Henry Rogers, now moved before a Judge in Chambers, under Rule 256, O. J. A., for an order directing the trial of an issue as to the validity of the lease.

J. Hoskin, Q. C., for the infants, did not object.

E. B. Brown, for the defendants who disputed the validity of the lease, did not object to an issue being directed, but contended that the *onus* was upon the person setting up the lease, and that he should be plaintiff in the issue.

FERGUSON, J., made an order directing the trial of an issue as to the validity of the lease at the next sittings at Toronto for the trial of actions in the Chancery Division: Henry Rogers to be plaintiff, and Sarah Ann Todd, Mary Brimson, and Elizabeth Norman to be defendants in the issue.

SCOTT V. WYE ET AL.

Married Woman—Judgment—R. 80, O. J. A.—47 Vic. ch. 19, (O.)

Held, that the “Married Women’s Property Act, 1884” (47 Vic. ch. 19, O.) is not retrospective.

A motion under Rule 80, O. J. A., for judgment upon a promissory note against a married woman was dismissed in April, 1883, and was now renewed, fourteen months after the passing of the Act of 1884.

Held, that that Act made no change in the law which could assist the plaintiff, even if the matter were *res integra*.

Turnbull v. Forman, 15 Q. B. D. 234, followed.

[September 14, 1885.—O’Connor, J.]

THIS was an action against a husband and wife, as maker and indorser of a promissory note.

In April, 1883, Mr. Winchester, who was then sitting for the Master-in-Chambers, made an order under rule 80, O. J. A., for the plaintiff to be at liberty to sign judgment against the husband, but refused to order judgment against the wife.

W. H. P. Clement, for the plaintiff, now renewed the application for judgment against the wife, (moving absolute a summons granted by the Local Judge at St. Thomas and by him referred to a Judge in Chambers), relying on the Married Women’s Property, Act, 1884, 47 Vic. ch. 19, (O.), and *Kinnear v. Blue*, 10 P. R. 465, *The Quebec Bank v. Radford*, 10 P. R. 619, and *Cameron v. Rutherford*, 10 P. R. 620.

J. F. Smith, contra, cited *Turnbull v. Forman*, 15 Q. B. D. 234.

O’CONNOR, J.—This is an application for leave to sign judgment under rule 80, O. J. A., against the wife, in order to issue execution against her separate property. A similar application was made in April, 1883, to sign judgment against both husband and wife, and it was allowed as against the husband, but refused as to the wife. The Master (or the Registrar, acting for him) in Chambers, held

that, as the law stood then, such leave could not be granted against a married woman. That decision was not appealed from; on the contrary the plaintiff's counsel or solicitor acquiesced, and let the matter drop.

In 1884, however, a new "Married Women's Property Act" was passed, and now, having had about fourteen months to consider the effect of that Act, the plaintiff applies again. Had the new Act not been passed this application would not have been made; and therefore the plaintiff or his solicitor has evidently concluded that a change has been made in the law favourable to his desire, and therefore this application.

But I think no change in the law has been made, which is available or of assistance to the plaintiff. I think the Act is not retrospective.

Subsection 2 of section 2 uses the term "shall be capable of entering into and rendering herself liable," &c.—the future tense; subsection 4 corroborates this view. Then, the saving clause, section 22, renders the meaning quite clear, if it was not so before. *Turnbull v. Forman*, 15 Q. B. D. 234, seems to be in point to this effect.

It follows, then, that, as there is no change in the law since the decision of 1883, affecting this case, the decision then given and acquiesced in as sound, is still binding; and even if the matter were *res integra* this motion could be disposed of only as that was.

Considering it quite clear that the recent Act has afforded no ground for this application, I dismiss the motion, with costs.

REGINA V. RICHARDSON.*

Criminal law—Conviction—Award of further imprisonment—32 & 33 Vic. ch. 32, secs. 28, 30, D.—Formal defect—Certiorari.

A conviction, in this case for keeping a disorderly house and house of ill-fame, was held bad for awarding, after the adjudication of a penalty by fine and imprisonment, further imprisonment in default of sufficient distress or of non-payment of the fine; and *Held*, also, that this was not a mere formal defect within section 39 of 32-33 Vic. ch. 32, D.

Held, also, that the effect of section 28 was not to take away the writ of *certiorari*.

[March 22, 1882.—*Osler*, J.]

MOTION to quash a conviction, and to discharge the defendant out of custody under the warrant of commitment issued on the conviction.

Osler, Q.C., for the defendant.

J. G. Scott, Q.C., for the Crown and prosecutor.

OSLER, J.—I have not the time at my disposal, at present, to consider fully all the objections taken to this carelessly drawn conviction.

I shall assume, although that does not appear from the conviction or from any of the papers before me, that it was made under 32-33 Vic. ch. 32, D., the Act relating to summary trial by consent, and not under the Vagrant Act, 32-33 Vic. ch. 28, D.

It purports to be a conviction of the defendant for that he did unlawfully keep a disorderly house and house of ill fame. Strictly, it does not aver that the conviction took place at Hamilton, or within the local limits of the jurisdiction of the Police Magistrate by whom it was made, though it may sufficiently appear from the marginal venue that it was formally drawn up there.

It adjudicates no penalty and awards no punishment, every thing after the convicting part being stated by way of recital, thus: "And whereas I did convict the said W. R.,

*This judgment was given just as the learned Judge was leaving on Circuit, and has only recently been handed out.—*REP.*

and did then and there adjudge the said W. R. for his said offence to be imprisoned," &c.

Even if this can be treated as an adjudication of a penalty by fine and imprisonment the conviction is irregular and defective in awarding further imprisonment in default of sufficient distress or of non-payment of the fine.

Other objections have been urged to the validity of the conviction and prior proceedings. I dispose of it on the objection last mentioned, but probably it would not be found very easy to support it against some of those which I have specified, even with the aid of the 30th section of the Act, which provides that no conviction, sentence, or proceeding under the Act shall be quashed for want of form.

The conviction imposes the maximum penalty authorized by the Act, viz., imprisonment for six months, and a fine of \$100, and then proceeds: "and I ordered that if the latter should not be paid forthwith the same should be levied by distress and sale of the goods and chattels of the said W. R., and in default of sufficient distress or non payment thereof I adjudged the said W. R. to be imprisoned in the said central prison at Toronto, aforesaid, for the further space of six months, unless the said sum of \$100 be sooner paid."

What section 17 of the Act authorizes is, that the fine may be levied by warrant and distress under the hand and seal of the magistrate, or the party convicted may be condemned in addition to any other imprisonment on the same conviction, to be committed to the common gaol, for a further period not exceeding six months, unless such fine be sooner paid.

One of two alternatives only for collection of the fine is authorized; either distress, or commitment for a further period unless the fine be sooner paid. Here the conviction adjudges (if it may be called an adjudication) that the fine shall be levied by distress and sale, and then that in default of sufficient distress or of non-payment the defendant shall be further imprisoned.

This is more than a mere formal defect and although it relates to one part of the penalty, viz., the mode of enforcing payment of the fine, it is clear that it vitiates the whole conviction: see *Paley* on Convictions, 5th ed. pp. 255, 272-3.

The conviction is, in my opinion, clearly bad and must be quashed. It follows that the warrant of commitment issued thereon must also fall and that the defendant is entitled to his discharge.

I have not overlooked sec. 28 of the Act, but I do not think, and indeed it was not argued, that its effect is to take away the writ of *certiorari*. It is very different in its terms from sec. 5 of ch. 35 The Juvenile Offenders Act. See *Regina v. St. Denis*, 8 P. R. 16.

REGINA V. NEWTON.

Criminal law—Conviction for keeping house of ill-fame—32 & 33 Vic. ch. 32—Use of the word “order” instead of “adjudge,” in conviction—Forfeiture of fine—Further imprisonment—Fine payable to magistrate—Evidence.

The defendant was convicted under the proceedings taken under 32 & 33 Vic. ch. 32, D., not 32 & 33 Vic. ch. 28, D., for keeping a house of ill-fame. The conviction merely “ordered” but did not “adjudge” any imprisonment or any forfeiture of the fine imposed :

Held, bad, as substituting the personal order of the magistrate for a condemnation or adjudication. The conviction and warrant of commitment ordered the defendant to be imprisoned for six months, and to pay within the said period to said magistrate the sum of \$100 without costs to be applied according to law, and in default of payment before the termination of said period, further imprisonment for six months : *Held*, bad, for uncertainty in requiring the fine to be paid to the magistrate personally instead of to the gaoler.

On the facts set out below, *Held*, that there was no evidence of the offence charged, and that the defendant must be discharged.

[September 2, 1886.—O'Connor, J.]

Aylesworth, moved to quash the conviction in this case, on the following grounds :

1. It is not established that the house is reputed a house of ill-fame.

2. That it is not shown that the prisoner, the said Emma Newton, was the keeper of the house.

3. That only one act is shown to throw suspicion on the character of the house, but that Emma Newton knew nothing about it.

4. That it is not shewn that any woman of ill-fame lived there.

5. There is no evidence to shew any wrong doing on the part of the said Emma Newton.

The conviction was for unlawfully keeping a house of ill-fame, contrary to the form of the statute in such case made and provided, and went on to state that the said Newton, having been tried summarily for the said offence and convicted thereof, was adjudged guilty thereof, and ordered her to be imprisoned in the common gaol for six months without hard labour, and to pay within said period

to the said magistrate the sum of \$100, without costs, to be by him applied according to law, and in default of payment before the termination of said period that the said Newton should be committed and imprisoned for the further period of six months, unless the said \$100 should be sooner paid.

The warrant of commitment followed the language of the conviction.

Aylesworth contended that both conviction and warrant were bad for want of any adjudication of punishment, the word "order" being used instead of the appropriate word "adjudge"; he objected that the conviction did not adjudge any forfeiture of the penalty imposed, and urged that the warrant of commitment was also bad for uncertainty as to the second term of imprisonment, which was made to be contingent on a payment of money to the magistrate himself, not to the gaoler. He referred to 32-33 Vic. ch. 32, sec. 17 (D.); 32-33 Vic. ch. 28 (D.), commonly called "The Vagrant Act,"—arguing that these two statutes were, as appeared on the evidence and record of conviction, confused by the police magistrate. He also referred to *Paley* on Convictions, 6th ed., pp. 263-4; *Regina v. Bassett*, 10 Prac. R. 386; *Regina v. Richardson*, ante p. 95, and argued on the evidence that Mrs. Newton was not the keeper; that no women of bad character were there; and that Mrs. Newton did not know of anything wrong there.

Capreol, contra, referred to the Imperial Act 25 Geo. II. sec. 8, to shew the kind of evidence required to establish reputation of ill-fame; *Regina v. Rice*, L. R. 1 C. C. 21; *Regina v. Howarth*, 33 U. C. R. 537; *Woods* on Nuisance, 36; *Regina v. Leveque*, 30 U. C. R. 509; *Rex v. Davis*, 6 T. R. 177; *Regina v. Peirsue*, 2 Lord Raym. 1197; *Clarke v. Periam*, 2 Atk. 339. He also referred to sec. 30 of the Act 32-33 Vic. ch. 32, as to objections for want of form, and argued that the evidence sustained the conviction.

September 2, 1885. O'CONNOR, J.—I have considered the case, carefully read the evidence, and examined the authorities. The case *Regina v. Howarth*, 33 U. C. R. 537, shews that the utmost penalty of the law, which was inflicted in this case, ought not to be imposed except in a case where the offence charged is clearly proved, and how the Superior Court will upon the return to the writ of *certiorari* view and consider cases wherein the evidence is doubtful and insufficient. *Regina v. Levecque*, 30 U. C. R. 509, is in some respects to the same effect, and it shews, (page 516,) "that describing the offence in the words of the statute is not, in many cases, a sufficient statement to sustain a criminal charge." It also shews that the evidence of a witness who speaks of the character by reputation only is not sufficient. Justice cannot permit that the character of an individual, an innocent person it may be, shall be blasted, and his or her liberty restrained, upon mere hearsay, perhaps mere gossip.

These cases were relied on by both sides, but I think their weight as authorities favours the prisoner. I am strongly inclined to the opinion that the conviction and the warrant of commitment are insufficient. The conviction "adjudges" nothing; it convicts, it is true; but it merely orders imprisonment, payment of a fine, and if the fine be not paid, further imprisonment. But this does not conform, nor is it equivalent to the language of the 17th section of the Act, or to the form prescribed by the 18th section, wherein the word "adjudge" is used. In this conviction the magistrate convicts, and then proceeds, "and I order the said Emma Newton for her said offence to be imprisoned," &c., "and to pay," &c., "and in default," &c., "to be imprisoned," &c., "for the further period," &c.

This appears to me to be a variance from the language of the statute and of the prescribed form, which amounts not merely to a want of form, as mentioned in section 30 of the Act, but to a substantial defect. The conviction substitutes the personal order of the magistrate for a "condemnation," or "adjudication."

According to *Paley* on Convictions, as cited, it seems clear, too, that as regards the fine, a forfeiture should be awarded, although the statute does not expressly require it; for the order to pay does not necessarily imply a forfeiture, and without a forfeiture it is not easy to understand what right there can be to pay the money to the county treasurer for county purposes.

The objection to the warrant for uncertainty as to the second term of imprisonment being contingent on payment or non-payment of the fine, is also, I think, well taken. The fine is to be paid to the magistrate personally; the gaoler therefore cannot receive it officially, and then how is he to know whether, or when it is paid or not?

Then, as to the insufficiency of the evidence, I think there can be no doubt whatever. (1) The evidence as to the ill-repute of the house was on its positive side unsatisfactory, referable almost wholly, either directly or indirectly, to one individual, who appears to have been sickly and nervous, and who kept a boarding house next to the house in question. He proved no improper act; and other facts from which he drew inferences of suspicion were only such as might have been observed in regard to a respectable house.

Other witnesses of the immediate neighbourhood neither observed nor heard of anything wrong regarding the house. On the other hand, the evidence for the defence was sufficient, I think, to remove suspicion from even the mind of the boarding house keeper himself. In the whole case only one fact of an evidentiary character was proved, namely, that a girl named Rouleau and a man, not her husband, were found in bed together in a room in the third story of the house; but it was also proved that the stairway leading to that room was on the outside of the house that the parties found could, and as a fact did, get there without the knowledge of the people in the house, and that Mrs. Newton had no knowledge of the matter whatever.

But evidence of one act of fornication committed in a house, particularly if it is committed without the knowledge of the keeper of the house, does not make it a bawdy

house or house of ill-fame. It was not proved either that any of the women seen at the house were prostitutes or women of ill-fame, except the girl Rouleau, of whose character it was not shown that Mrs. Newton had any knowledge. It was further proved that the house was rented from the owner and kept up by a brother of Mrs. Newton, apparently a respectable man, a baker by trade, in steady employment; and that his sister Mrs. Newton merely kept house for him. *Primâ facie*, then, she was not the keeper of the house. I am not prepared to say that she could not under such circumstances be the keeper of a house of ill-fame within the meaning of the statute; but that fact would have to be shown with certainty by clear and distinct evidence, which was not done in this case. I am therefore of opinion that the prisoner should be discharged.

Conviction quashed.

HILL V. THE NORTHERN PACIFIC JUNCTION RAILWAY
COMPANY.

Single Judge in Court—Power to review findings of referee—Secs. 48 and 50, O. J. A.

Held, that a single Judge, sitting as the Court, has power to review the findings of an official referee upon a reference under sec. 48, O. J. A.

[September 8, 1885.—*Ferguson, J.*]

THIS was an action for compensation for land expropriated by the defendants, which was referred by an order in Chambers, made on the 28th April, 1885, under sec. 48, O. J. A., to the Junior Judge of the County of Simcoe, as an official referee.

Boulton, Q.C., for the defendants, moved before *Ferguson, J.*, in Court, by way of appeal from or to set aside the report of the official referee, on the ground that the findings in the report were contrary to evidence and the weight of evidence.

J. C. Hamilton, for the plaintiff, objected that the motion should have been to the Divisional Court. By sec. 49, O. J. A., the report was made equivalent to the findings of a jury, which can be moved against only in the Divisional Court: *Cook v. The Newcastle and Gateshead Water Co.*, 10 Q. B. D. 332; *Dyke v. Cannell*, 11 Q. B. D. 180.

Boulton, Q.C., in answer to the objection. There is no doubt the English practice is as stated by my learned friend: here, however, the practice is different, and the motion is properly made before a single Judge in Court: *Luney v. Essery*, 10 P. R. 285; *Cumming v. Low*, 2 O. R. 499.

FERGUSON, J.—I am of the opinion that I have jurisdiction, though there is much to be said against this conclusion. See sec. 50 of the O. J. A.

ROSS V. CARSCALLEN.

Judgment by default at trial—Motion to set aside—Jurisdiction of Judge as the Court—Rules 214, 270, O. J. A.

The Judge who presides at the trial, and pronounces judgment by default for the defendant in the absence of the plaintiff, has power under Rule 270, O. J. A., when afterwards sitting as the Court at Toronto to set aside such judgment.

Hilliard v. Arthur, 10 P. R. 281, distinguished.

[September 14, 1885.—*Ferguson*, J.]

A MOTION by the plaintiff to set aside the judgment for the defendant entered at the trial before Ferguson, J., at Chatham, in the absence of the plaintiff, his counsel, and witnesses.

The motion was made before Ferguson, J., in Court.

Raymond, for the plaintiff.

Moss, Q.C., for the defendant.

The following authorities were referred to: *Hilliard v. Arthur*, 10 P. R. 281, 426; *Wilson v. Irwin*, 10 P. R. 598; *Burgoine v. Taylor*, 9 Ch. D. 1; *Cockle v. Joyce*, 7 Ch. D. 56; *Wright v. Clifford*, 26 W. R. 369.

FERGUSON, J.—The action is for the alleged infringement of a patent. The defendant did not, nor does he, dispute the validity of the patent, but he denied that he had infringed as alleged by the plaintiff.

The case came on for trial before me at Chatham. The plaintiff was not, nor were his counsel, or witnesses, present. An agent of plaintiff's counsel, however, appeared and asked that the trial should not be proceeded with till the following Monday, this being on a Saturday. Defendant's counsel stood upon his strict rights. The case was the last one upon the docket of cases, which had been a comparatively long one. The plaintiff's agent upon being asked by me if he would undertake the extra expense of defendant's witnesses, if the case were to stand over as he

requested, declined to do so, as he had no instructions on the subject. Under the circumstances, and being pressed by counsel for the defendant, the onus being upon the plaintiff, I entered a judgment for the defendant.

This motion is made before me in Toronto, being after the close of the sittings at Chatham, to set aside the judgment and for a new trial. The application is made under the provisions of rule 270. The defendant contends that I have no jurisdiction, that such a motion could only have been made before me at the sittings at Chatham, and that a motion of this character, when made in Toronto, should be made before the Divisional Court. Counsel for the defendant offered to consent to an undertaking on his part not to manufacture the article, or in any way infringe the plaintiff's patent, being inserted in the judgment, which has not yet been drawn up, or issued; this however to be without admitting that he had infringed the patent, &c., and further contended that a new trial should not be ordered, even if I had jurisdiction to entertain and dispose of the motion, as no substantial question of damages was involved, and a new trial could, under such circumstances, only affect the matter of costs. Plaintiff's counsel did not say that there was or is a matter of substantial damages, nor did he deny the statement that the price of what was done by the defendant, whether an infringement or not, was only \$12.90, and that this the defendant did for another person, and for wages or hire.

Rule 270 is as follows: "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit; such application may be made at the assizes or sittings at which the trial took place, or in Toronto." This is identical with the present English rule 457 (New Rules, '83), except that the English rule limits the time for making the application to six days after the trial, and the former English rule was the same as the present one. Our rule 214 is identical with the English rule 308, and is as follows: "Any judgment by default, whether

under this order or under any other of these rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit."

The case *Vint v. Hudspith*, 29 Ch. D. 322 (for a reference to which I am indebted to the Chancellor), was a case in which the plaintiff did not appear at the trial and judgment went for the defendant. Both the learned Judges in Appeal, Cotton, L. J., and Bowen, L. J., in delivering judgment mentioned this as a "judgment by default." The case had been brought before them in the first instance under a direction, or rather an *undertaking*, contained in an order made by Mr. Justice Pearson, to appeal from the judgment in the action, reliance being placed on Order lviii., Rule 140. The trial took place in April, 1883. The plaintiff knew nothing of it, as he said. The six days had long since elapsed. The writs of *elegit* went in August, 1883, for the costs of the defendant, and after this the plaintiff moved, &c.

The Court said that the proper course was to apply to the Judge to restore the cause. They said that they had as a Court of Appeal jurisdiction, but it was right that the plaintiff should first apply to the Judge who gave the judgment. Application was afterwards made to Mr. Baron Pollock, before whom the trial had been, and it was refused on the merits, he holding that the plaintiff had under the facts disclosed no interest in the action.

The Court in that case did not pointedly refer to the rule or rules under which they acted, but it seems to me that it must have been under either or both of the rules 457 and 308, if under any rules at all, and we have in Ontario rules, as I have shewn, the same as these, except the six days' limitation in the English rule 457.

For these reasons it appears to me that I can properly entertain the present motion, and I do not see that my so holding will necessarily conflict with the decision in *Hilliard v. Arthur*, 10 P. R. 599, as the learned Judge in that case apparently confined himself to the interpretation of rule 270, and only decided that a Judge in Chambers could

not entertain the motion. At all events the circumstances of that case were different from those of the present case, for the trial of this case was before me, and the application is made before me sitting in Court. The application in that case was not made before the Judge who tried the cause, but was originally returnable before the Master-in-Chambers, who enlarged the motion to be heard before a Judge, who was not the one before whom the action came on for trial.

The motion was afterwards disposed of, on the merits, by the refusal of a new trial.

RE LEWIS—JACKSON V. SCOTT.

*Will—Cause transferred from Surrogate Court—Jury—Heir-at-law—
Sec. 45, O. J. A.*

The Court of Chancery had, before the O. J. A., exclusive jurisdiction in actions to establish wills, and its power to direct a trial by jury (R. S. O. ch. 40, sec. 99,) is continued in the High Court under sec. 45, O. J. A. But the heir-at-law, the defendant, in such an action has not now in this Province an absolute right to a jury, and the Court refused to direct one on the issues raised herein.

[September 19, 1885.—*Ferguson, J.*]

MOTION by the defendant to have the issues tried by a jury and the action sent for trial to the Middlesex Assizes, the plaintiff having obtained an order transferring the action from a Surrogate Court to the High Court of Justice, Chancery Division.

The defendant, who was the heir-at-law of the testator, pleaded:

1. That the will was not executed in due form, as required by the statute.

2. That the testator was not of sound mind, memory and understanding.

3. That there was undue influence of the plaintiff and others.

4. Fraud of the plaintiff.

5. That the testator at the time, &c., was labouring under certain delusions stated.

W. H. P. Clement, for the motion, cited *Howell's Sur. Ct. Prac.* 355; *Dodd & Brooks' Prob. Prac.* 732; *Coote's Prob. Prac.* 330; R. S. O. ch. 46 sec. 18.

Holman, contra, cited *Thurlow v. Beck*, 9 P. R. 268; *Re Bouverie*, 2 Sw. & Tr. 548.

FERGUSON, J.—I am of the opinion that the heir-at-law has not the right to have the issues tried by a jury simply because he demands or asks it. This absolute right as stated in some of the late books of practice, seems to me to rest upon a provision in section 35 of the English Act of 1857. There is some authority for the contention prior to that Act (see *White v. Wilson*, 17 Ves. 87 at p. 91), but the reason given there, or the apparent reason, does not, I think, exist now. Our Act of 1858, passed the year after the passing of the English Act, does not contain the same provision with regard to the right of the heir-at-law, and, as I have said, I think the absolute right does not exist in this country. Under the provisions of the Surrogate Act the removal or transfer of a matter is by the Act to the Court of Chancery (the Chancery Division). Until the passing of 40 Vic. the appeal was also to the Court of Chancery, and there appears to me ground for saying that the matter is one over which the Court of Chancery had at the time of the passing of the Judicature Act exclusive jurisdiction. See sec. 45 of the Act and *Thurlow v. Beck*, 9 P. R. 268.

The cause has been removed or transferred from the Surrogate Court to the Chancery Division. Section 30 of the Surrogate Act gives general jurisdiction, and also the power to cause the issues or any of them to be tried by a jury. Under section 99 of ch. 40 R. S. O. (the Act known

as the Chancery Act) there is power to send issues to be tried as there pointed out. It was not disputed that there is power resting in this Court to do as the Court of Chancery might have done under that section. If the matter is one over which the Court of Chancery had at the time of the passing of the Judicature Act exclusive jurisdiction section 45 does not, as it appears to me, prevent the sending of issues for trial by jury, because such a course is, I think, included in the "practice" mentioned in the section.

The issues in question are mentioned above, and the question that I have now to determine seems to me to be, whether or not these issues are such in their character or kind that they should be sent to be tried by a jury. In other words, if the same issues were raised in an action brought in the Chancery Division, would it be proper upon an application made for the purpose to order that they or any of them should be tried by a jury? On this subject different minds might easily arrive at different conclusions. The issues are of kinds that are constantly being tried in this Division of the Court without a jury. Nothing of an extraordinary or peculiar character is disclosed in the case, and all I can say is that I do not perceive any sufficient reason for making the order that is asked. I think the cause can properly and fitly be disposed of in the ordinary way without the intervention of a jury.

The application is therefore refused, with costs.

BOUGHTON v. THE CITIZENS INSURANCE COMPANY ET AL.

Production of documents—Letters—Reference to Solicitor's advice—Privilege.

Letters, written to the defendant company by a clerk, who was specially instructed to investigate the plaintiff's accounts and take the advice of the company's solicitors, and which contained references to their advice, were held privileged from production.

Semble, a second application for a better affidavit of documents is improper, where no objection is made on the first application to the non-production of the documents in question, the second motion not being made upon any materials which did not exist at the time of the first motion.

[October 1, 1885.—*The Master-in-Chambers.*]

THIS was an action for damages arising out of the arrest, at the instance of the defendant company, of the plaintiff, who was at one time the Toronto agent of the said company.

George Macdonald, for the plaintiff, moved for a better affidavit of documents from the defendant company. He cited *Bustros v. White*, 1 Q. B. D. 424; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644.

Rae, for the defendants, contra, cited *Macdonald v. Norwich Union*, 10 P. R. 501; *Pearson v. Foster*, 15 Q. B. D. 118; *Merchants' Bank v. Moffatt*, 6 P. R. 308.

THE MASTER-IN-CHAMBERS.—This is a motion for a better affidavit on production. The documents sought are certain letters written by Mr. Eastmure, one of the defendants, a clerk of the defendants the company, to the company at Montreal; and the reason given to excuse their non-production is, "that they were written in anticipation of litigation, and contain references to the advice given by the company's legal advisers in the matter of the prosecution of the plaintiff, and were written after consultation with the said legal advisers."

I should say that this is a second application for a better affidavit, a better affidavit having on the former application been ordered, and made, as to certain matters; but that on

that occasion there was no objection to the non-production of the letters now in question. I do not understand that parties can so proceed. The motion is not made upon any grounds which did not exist at the time of the former motion. However, this is not now objected to by the defendants.

The only matter which has happened since which might have affected the question is the examination on discovery of the defendants; and it appears on the examination of Mr. Hart, the general manager of the defendants' company, that Mr. Eastmure, the other defendant, was sent to Toronto by the company to investigate the accounts of Mr. Boughton, the plaintiff, the agent of the company there, and upon his reporting an unsatisfactory state of things, he was instructed by Mr. Hart to take the advice of the defendants' counsel, Messrs. Smith, Smith, & Rae, and of the Crown prosecutor, and, if they approved of having him arrested, to do so.

Now it will be observed that it is sworn that the letters "contain references to the advice given by the company's legal advisers, and were written after consultation with the said legal advisers." And when the instructions to Mr. Eastmure are considered, and what Mr. Eastmure's position was, it seems to me that the letters are protected upon well known principles, and that in view of all the facts, it is just as though the letters had been written by the solicitors to the company at Montreal.

BRYCE, McMURRICH & CO. v. SALT.

Judgment—Indian—C. S. C. ch. 9—Indian Act, 1880 (D.)

On an application which was granted under Rule 80, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve,
Held, that since the repeal of C. S. C. ch. 9, there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, sec. 77, (D.) the judgment will not bind any property of the Indian except that described in sec. 75.

[October 2, 1885.—*The Master-in-Chambers.*]

AN application for judgment under Rule 80.

Urquhart, for the motion.

Holman, contra, cited *McKinnon v. VanEvery*, 5 P. R. 284, and *Regina ex rel. Gibb v. White*, 5 P. R. 315.

THE MASTER-IN-CHAMBERS.—The papers are in the ordinary form. Claim for a balance due on promissory notes, balance \$668.55.

The only defence is that the defendant is one of a tribe of Indians, living with his tribe on their reserve. There is a negative of his being the holder of any real property, or personal property, outside of the reserve.

The 77th section of the Dominion Act of 1880, ch. 28, is in these words: "No person shall take any security, or otherwise obtain any lien or charge, whether by mortgage, judgment, or otherwise, upon real or personal property of any Indian or non-treaty Indian within Canada, except on real or personal property subject to taxation under section 75 of the Act. Provided always, that any person selling any article to an Indian, or non-treaty Indian, may, notwithstanding this section, take security on such article for any price thereof which may be unpaid." The real or personal property mentioned in this section is described in section 75 as real estate under a lease or in fee simple, or personal property, outside of the reserve, held in his individual right.

Upon this it is contended by the defendant that no judgment can be had against an Indian. Every individual however is capable of suing and being sued, unless some special exemption can be shewn.

There was a time, when the Consolidated Act of Canada ch. 9 was in force, when an Indian *could not* have been sued under the facts shewn here. But that was repealed long ago, and the existing law is as I have cited it above.

It is true that the judgment the plaintiff will recover will not bind any property of the Indian, except that described in section 75; but there is nothing to prevent an Indian from suing and being sued, so that the plaintiff is entitled to judgment *valeat quantum*.

Under the Consolidated Act the fact that the Indian was not seized in his own sole right of land in fee simple would have been a defence to the action, but it is not so now.

NOTE.—See *Block v. Kennedy*, Man. Rep. Temp. Wood 144.—REP.

HAY V. PATERSON.

Ca. sa.—Execution—R. S. O. ch. 69.

A defendant arrested and imprisoned under a *ca. sa.* is a debtor in close custody in execution within the meaning of R. S. O. ch. 69.

[June 19, 1885.—*Rose, J.*]

THE defendant was in custody under a writ of *ca. sa.*, issued after judgment for the purpose of preventing him leaving the jurisdiction.

This was an application for the defendant's discharge made under the 9th section of the Indigent Debtors' Act, R. S. O. ch. 69

Pending the motion an order had been made for the defendant's examination under sec. 8 of the Act.

Walter Read, for the motion.

Shepley, contra.

ROSE, J.—This is an application by the defendant for discharge under the Indigent Debtors' Act, on an affidavit made under the 9th section, stating amongst other things that he is in close custody in execution, and has not been served with an order for examination.

The application is made upon notice instead of summons, but no objection is raised as to this. Mr. Shepley contends that the defendant is not in close custody in execution, because he never was arrested on *mesne* process, but first on a *ca. sa.*, citing *Hesketh v. Ward*, 4 P. R. 158; *Wheatly v. Sharp*, 8 P. R. 189; *Archbold's Q. B. Prac.* 12th ed. p. 1207.

I think the defendant is without doubt in close custody in execution. A confusion between "charging in execution" and "close custody in execution" has given rise to the contention.

The reference to *Archbold's Prac.*; and *Hesketh v. Ward*, 17 C. P. at p. 697, shows that only a defendant who has been arrested on *mesne* process can be charged in execution; but

a further reference to *Archbold*, p. 694, will show that a *ca. sa.* is a writ of execution, and the preceding text will show that an arrest on a *ca. sa.* is a taking of the defendant in execution. The defendant having been taken in execution, and being in close custody, is a debtor in close custody in execution.

The plaintiff's counsel says he has not acted upon the order to examine I granted some days since, as he did not wish to waive this objection. The defendant has, therefore, been led to make this motion prematurely, or rather the attendance to-day has been an extra expense to the defendant, if I allow the plaintiff now to proceed with the examination. The plaintiff must not, therefore, have any costs of such attendance, and it may be the defendant is entitled to them. This will better appear after the examination, which should now be proceeded with without further delay.

JAMIESON V. PRINCE ALBERT COLONIZATION COMPANY.

Appeal from Local Master—Rescinding order—Time—Rule 427, O. J. A.

An *ex parte* order for the production of documents was made by the Local Master at Belleville on the 17th August, 1885, and an order was made by the same officer on the 9th September, 1885, refusing to rescind his former order. The defendants appealed from the latter order.

Held, that the appeal was, in effect, an appeal from the original order, as the result, if the appeal were successful, would be to rescind that order, and the appeal was therefore dismissed as too late, under Rule 427, O. J. A.

[October 1, 1885.—*Ferguson, J.*]

THIS was an appeal by the defendants from an order made in Chambers by the Local Master at Belleville, refusing to rescind his own *ex parte* order for the production of documents by the plaintiff.

The first order was made on the 17th August, 1885, after judgment had been entered in the action for default of appearance, and pending a motion to set aside that judgment.

The order appealed from was made on the 9th of September, 1885, and the appeal was brought on within eight days thereafter, but was enlarged from time to time till it was argued on the 28th September, 1885.

Arnoldi, for the appellants.

Hoyles, for the respondent. This is virtually a motion to rescind, or an appeal from the first order. There is no jurisdiction to hear a motion to rescind, and it is too late to appeal from the original order: *Ryan v. Canada Southern R. W. Co.*, 10 P. R. 536. The appellants cannot by a side wind get rid of the original order; they should have appealed from it in the first instance. In the affidavits filed by the defendants on the motion to rescind, there was nothing which was not before the Judge when he made the first order.

Arnoldi, in reply. This is not an appeal from the original order. The defendants took the proper cause in moving before the Master to rescind his own order, and the appeal is now properly brought on from the second order. The original order should not have been made *ex parte*; by moving to rescind it, the appellants were able to put in affidavits shewing their side of the case, which they would not have been allowed to do on appeal. Even if the appeal is too late the time should be extended, as was done in *Locomotive Engine Co. v. Copeland*, 10 P. R. 572.

FERGUSON, J.—The appeal is from the decision of the local Master at Belleville refusing to rescind his own order, which was an order for the production of documents, dated August 17th, 1885. The order refusing to set aside that order was made on the 9th day of September, 1885. By 48 Vic. ch. 13, sec. 21, (O) it is provided that the County Court Judge (other than the Judge of the County Court of the county of York) and the local Master shall have the same power and authority, &c., and that the orders and decisions of such Judge or Master shall be subject only to appeal to a Judge of the High Court. Before this en-

actment it had been decided in *Ryan v. Canada Southern R. W. Co.*, 10 P. R. 536, that a Judge in Chambers had no power to set aside an order of the local Judge of the High Court at Sandwich, made in Chambers. That decision is referred to in *Locomotive Engine Co. v. Copeland*, 10 P. R. 572. From these cases, and the statute referred to above, it appears to me that I have no power to rescind the order firstly made by the local Master, namely, the order for production of documents, otherwise than upon an appeal from the same. The time within which such an appeal could be made is prescribed by rule 427. No such appeal was had within the time so prescribed, and it does not appear to me that this is a case in which any further time should be allowed for such an appeal, even if this were now asked, there appearing to be no real merits,

The order for production of documents would thus appear not to be subject to an appeal, by reason of the time for appealing having expired, and not subject to a motion to a Judge sitting here in Chambers for the rescission of it on account of want of jurisdiction.

Now, it appears to me, that moving before the Local Master for the rescission of his own order, and upon his refusal to rescind it, appealing from his order so refusing, is only, as it were, another mode of appealing from the order firstly made by him, the order for production. If this were allowed, the time prescribed by Rule 427 for appealing in such cases, would in each case be practically enlarged until the appeal from the order refusing to rescind. If the appeal were successful, the result would be a rescission of the first order of the Local Master. Looking at the matter in another way, this appeal is tantamount to a motion to rescind the first order of the Local Master. If such a motion were made directly it could not be entertained for want of jurisdiction. It seems to me that what could not be done directly cannot be accomplished by adopting this indirect method, and I am of the opinion that this appeal should be dismissed, with costs.

Appeal dismissed, with costs.

ROGERS v. LOOS.

Payment into Court—Defence—Retention of money as security for costs—R. 217, O. J. A.

The statement of defence set up that the assault complained of was in self-defence and, as an alternative defence, that, while the defendant did not admit his liability for damages, he brought into Court \$150 and said that the same was sufficient, &c.

Held, that the money paid into Court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case was made for ordering security for costs.

[October 1, 1885.—*The Local Judge at Walkerton.*]

[October 14, 1885.—*Boyd, C.*]

THIS was an application by the defendant for an order that the moneys paid into Court by him should remain in Court until after the final judgment herein; and also for an order transferring this cause from the Chancery Division to that of the Queen's Bench or Common Pleas.

The statement of defence, under which the money had been paid in, set up that the assault complained of was in self defence, and also alleged as follows: "And as an alternative defence the defendant says that, while not admitting that he is liable to pay the plaintiff any damages whatever, in respect of the matter complained of, he brings into Court \$150, and says that sum is sufficient to compensate the plaintiff," &c.

KINGSMILL, LOCAL JUDGE.—Upon the affidavits filed it appears to me very doubtful if the defendant could make his costs out of the plaintiff if he, the defendant, should be successful, but nothing is shewn to bring the case into the class where security for costs would be directed under the practice of our Courts: the plaintiff being a resident of Ontario.

Rule 217 is the same as the English Rule, and therefore the cases under the latter are applicable. The Rule is that "money paid into Court as aforesaid may, *unless otherwise ordered by a Judge*, be paid out to the plaintiff."

There is, of course, a wide difference between cases like the present and such cases as *Radmore v. Elliott*, 21 C. L. J

339, lately before Mr. Dalton, and referred to by counsel in their argument of this case. There the defendant, paid into Court a sum of money admitted to be due to the plaintiff for wages, and Mr. Dalton refused to grant an order that it should remain in Court, the case not being one in which he would have directed security for costs.

Emden v. Carte, 19 Ch. D. 311, followed *Berdan v. Greenwood*, 3 Ex. D. 251, by which it is laid down that, "as a general rule, a defendant may by his statement of defence deny the plaintiff's causes of action, and at the same time plead payment into Court in respect of the whole, or any part of them."

In *Emden v. Carte* we find Jessel, M. R., thus expressing himself, p. 316: "Of course, it is obviously inconsistent to say, on the one hand, 'I admit I am liable to you for so many hundreds of pounds,' and on the other, to say, 'I deny my liability altogether.'" But, though inconsistent, that is a mode of pleading which is now permissible under the Judicature Act and, as has been pointed out by the late lamented L. J. Thesiger, in *Berdan v. Greenwood*, it is quite intelligible that a man may say, "I am under no liability to you, but I am willing to pay you a sum of money if you abandon your claim"; and that mode of pleading enables a defendant so to say. But when he says it, the legal consequences, as gathered from that judgment, are exactly the same as if it had been a pure admission of liability—the plaintiff has a right to take the money out of Court, and to keep it, whether it is paid as a simple admission of liability (in which case, of course, he would be entitled to keep it) or paid in the nature of a payment of, as it is sometimes called, 'blackmail,' to get rid of the trouble or the expense of the action. In either case it is paid in, and there is an end to it, and the plaintiff has the right to take it out of Court and keep it as his own." See *Wheeler v. United Telephone Co.*, 13 Q. B. D. 597; and *Goutard v. Carr*, 13 Q. B. D. 598, note.

So L. J. Brett says (p. 322): "If a defendant will pay money into Court, although at the same time he denies his

liability, nevertheless the plaintiff is entitled to take that money out of Court; and if the defendant afterwards succeeds upon the question of liability, nevertheless the plaintiff is entitled to keep the money taken out of Court." And Lindley, L. J., follows to the same effect. Under these decisions Rogers is entitled to the money paid into Court, and to take it out and keep it, and as this is not a case, as I before remarked, in which the defendant would be entitled to security for costs, I cannot see any ground on which I can make an order preventing the plaintiff from taking the money out of Court, and I must dismiss that portion of the defendant's application.

The other motion, made apparently with this for convenience, before the case was at issue, and before it is known whether or not the plaintiff will accept the sum paid in, is, I think, premature, and must fall with the main motion.

Costs to be costs in the cause to the plaintiff in any event.

The defendant appealed from this decision to a Judge in Chambers.

W. H. P. Clement, for the appeal.

Hoyles, contra.

BOYD, C.—(After reserving judgment.) The order of the local Judge is right, and I can add nothing to the reasons which he has given.

Appeal dismissed, with costs.

See *Bell v. Fraser*, now reported 12 A. R. 1.

BROWN V. NELSON.

Claim and counter-claim—Cross-judgments—Set-off—Solicitor's lien.

Where judgments were recovered in the same action by the plaintiff on his claim with general costs of action, and the defendant on his counter-claim with costs thereof, such claim and counter-claim arising out of the same subject matter, the judgment for counter-claim largely exceeding the former in amount, a set-off was allowed of so much of the money recovered by the defendant against the plaintiff on defendant's counter-claim as would cover the costs adjudged to the plaintiff on his recovery of judgment against the defendant notwithstanding the claim of the plaintiff's solicitors to a lien on the costs adjudged to the plaintiff.

Quere, when a judgment, as in this case, has been framed without directing a set-off, whether a Judge in Chambers has power to direct it to the prejudice of the solicitor, so as to vary the decree of the Court.

[November 8, 1884.—*The Master-in-Chambers.*]

[December 24, 1884.—*Osler, J. A.*]

THE Queen's Bench Divisional Court, by order dated September 16th, 1884, directed that judgment be entered for the plaintiff against the defendant, for the transfer and delivery by the defendant to the plaintiff of 44 shares in the capital stock of the *Globe* Printing Company, together with the general costs of the action; and by the same order the defendant recovered judgment against the plaintiff upon a counter-claim for \$38,000, the price of 76 other shares of *Globe* Printing Company's stock, which had been sold by the defendant to the plaintiff in 1880. The defendant claimed to be entitled to set off against the general costs of the action, the costs of the counter-claim, and of the other issues upon which he succeeded.

C. R. W. Biggar now moved on behalf of the defendant for an order directing that the general costs of the action, when taxed and reduced by the amount of the defendant's taxed costs, should be applied, *pro tanto*, upon the judgment debt of \$38,000. He filed affidavits shewing that execution had been issued and was unsatisfied, and that the amount due thereon was now about \$14,000, which could not be recovered from the plaintiff.

Wallace Nesbitt, for the plaintiff, shewed cause. He filed affidavits of the plaintiff and of his solicitor, shewing that nothing had been paid by the plaintiff to his solicitors on account of costs, and claiming for the solicitors a lien upon the costs awarded by the judgment. He cited *Webb v. McArthur*, 4 Ch. Chamb. R. 63; *Collett v. Preston*, 15 Beav. 458; *Domett v. Helyer*, 2 Dowl. 540; *Little v. Philpotts*, 31 L. J., (Q. B.) 125; *Stooke v. Taylor*, 5 Q. B. D. 569; *Dawson v. Moffatt*, 20 C. L. J. 369; 10 P. R. 366.

C. R. W. Biggar in reply referred to *Pringle v. Gloag*, 10 Ch. D. 676; *Cattell v. Simons*, 6 Beav. 304; *Robarts v. Buë*, 8 Ch. D. 198; *Taylor v. Popham*, 15 Ves. 72; *Wright v. Chard*, 4 Drew. 702; *Bank of Upper Canada v. Thomas*, 10 Grant 356; *Howell v. Harding*, 8 East 362; and contended that the true rule is as laid down in *Bawtree v. Watson*, 2 Keen 713, and *Gwynn v. Krous*, 7 Irish Equity 274, that the attorney's lien attaches only on the ultimate balance found due as between the parties to the suit, after making every deduction and allowing every set-off to which either is equitably entitled. He distinguished the cases cited for the defendant, on the ground that all except *Dawson v. Moffatt* were cases of cross judgments in separate actions, and that in *Dawson v. Moffatt* the application was to take away a vested right which the plaintiff had acquired to costs payable out of a specific fund.

THE MASTER-IN-CHAMBERS.—This is a motion by the defendant to set off so much of the money recovered by the defendant against the plaintiff, on defendant's counter-claim, as will cover the costs adjudged to the plaintiff on his recovery against the defendant, on his statement of claim.

I think I ought to make an order for the set-off that is sought.

These several recoveries have been had in the same suit, and have been decreed by the same judgment. *Prima facie* therefore the set-off should be allowed, as of course. But it is objected on the part of the plaintiff that his solicitor has a lien on his costs to their whole amount, and

that therefore it will be a wrong to the plaintiff's solicitor to allow the set-off the defendant seeks.

There are a great many cases in the books where questions of this kind have been discussed, and from the perusal of a number of authorities I think that in such a position as above is described, the plaintiff's solicitor has no right to interpose his interests to prevent equity being done between the principal parties, as well as to costs in this suit as to the subject matter of the suit. He must look to his client to pay his costs, if need be. This seems to be very clearly the rule both at law and in equity. I cite a recent case of *Pringle v. Gloag*, 10 Ch. D. 676, which seems to me quite in point. It was this: By an arbitrator's award in an action, the plaintiff was ordered to pay a sum of money to the defendant, and the defendant was ordered to pay the plaintiff a part of his costs when taxed. It was held that defendant was entitled to have the debt set off against the taxed costs, and that the right of set-off in such a case was not interfered with by the ordinary solicitor's lien for costs. The Master of the Rolls, in his judgment, said (p. 680: "It appears to me, that it would be a monstrous extension of the rights of a solicitor against the parties to an action, to say that he should have the right to make the party who may have been successful in the ultimate result pay the losing party's costs; and unless I found an authority so deciding, I should decline to accede to any such proposition." I refer also to the following cases, all of which support the same view: *Wright v. Chard*, 4 Drew. 702; *Taylor v. Popham*, 15 Ves. 72; *Haynes v. Gillen*, 21 Grant 15; *Bawtree v. Watson*, 2 Keen 713; *Gwynn v. Krous*, 7 Irish Equity 274; *Robarts v. Buë*, 8 Ch. D. 198.

In fact I am not aware of any case which maintains the right of a solicitor to assert a lien, such as the plaintiff is putting forward here. *Little v. Philpotts*, 31 L. J. (Q. B.) 125, which was cited to me as maintaining such a right, is put by Mr. Justice Blackburn, the Judge who decided it, upon grounds which are quite consistent with what I have said.

I must make the order for the set-off as asked.

On appeal argued by the same counsel, before Osler, J. A.

OSLER, J. A.—This case is not entirely free from difficulty, but I think the proper way to look at it is, that the action and counter-claim were really in relation to the same subject matter. The plaintiff has succeeded partially, but he failed to sustain that part of his demand which concerned the cancellation of the note for which the defendant now has judgment against him, and neither he nor his solicitors could have been ignorant, when the action was brought, that if in this respect they were not successful, the inevitable result would be that the defendant would, as he has done, get judgment upon the note if he chose to ask for it. Therefore, I am inclined to think, that in adjusting all the equities between the parties in the transactions in question in the suit, the Court would see that the party who owed the larger sum should not compel his antagonist to pay him a smaller sum found due in the course of the same suit, but would set off one against the other *pro tanto*, especially if the former was insolvent.

As Lord Eldon says in *Taylor v. Popham*, 15 Ves. 72, 75 : “Where in a cause, comprising a great number of questions, costs may ultimately be due to both parties, and sums, to be paid as duties to each, the demands of both shall be arranged, so as to do justice between them; and the lien of the solicitor is only as to those costs, which upon the whole, taken together, one party can claim from the other.” And again at p. 79: “The doctrine of this Court has all along been, that, where the different demands arise in a cause, the costs should be arranged, as the equities between the parties require; without considering the solicitor.”

Now looking at the circumstances I have adverted to namely, that all is one transaction, and that the plaintiff if he failed to have the note cancelled might expect to have judgment against him for the amount, the solicitors do not seem to have any equity to compel the defendant to pay them a small sum for costs, when their client is unable to pay the defendant a sum nearly ninety times larger. It is

the sort of case in which, as the Master of the Rolls observed in *Pringle v. Gloag*, 10 Ch. D. 676, (better reported in 40 L. T. N. S. 512) "the solicitor should see before he undertakes a particular business for a client, that that client is able to pay him for it."

I do not however proceed specially upon the case just referred to, which is quite distinguishable from a case where claim and counter-claim are independent of each other.

No new rule is laid down different from that which would have been acted upon at law in dealing with claims in the same suit: See *Dunn v. West*, 10 C. B. 420, which was not cited to the Master of the Rolls.

I proceed upon the reasons I have already stated, and the cases of *Taylor v. Popham*, *supra*, *Bawtree v. Watson*, 2 Keen 713, and authorities mentioned in the note to the Am. ed., which appear to support them.

But I by no means wish to be understood as holding that where the claim and counter-claim are independent of each other, the costs should be dealt with otherwise than they would have been dealt with before the Judicature Act. Where judgments were recovered in cross-actions between the same parties, the practice was, (and I think as a general rule should still be, where the claim and counter-claim are independent), not to allow a set-off to the prejudice of the solicitor's lien upon the ultimate balance which may be found due in respect of costs, after setting off such costs as the rules require or permit to be set off between the parties: Rules 436, 169. The action and counter-claim are for many purposes quite distinct: *Blake v. Appleyard*, 3 Ex. D. 195; *Staples v. Young*, 2 Ex. D. 324; *Winterfield v. Bradnum*, 3 Q. B. D. 324, 326, per Brett L. J.; *Cole, Marchant, & Co. v. Firth*, 4 Ex. D. 301; *Neale v. Clarke*, 4 Ex. D., at pp. 295, 300; *Stooke v. Taylor*, 5 Q. B. D. 569; *Baines v. Bromley*, 6 Q. B. D. 197, 691. They are, or may be, merely two actions combined in one for convenience of procedure, and then there is not the same reason for treating the solicitor's lien as

entirely subject to the claims between the parties themselves. Of course the Court in framing the decree or judgment on the claim or counter-claim, may, in each case, frame it as may be thought proper; Rule 169; but when it has been framed without directing a set-off, I think a Judge in Chambers would not direct it to the prejudice of the solicitor's claim so as to vary the decree or order of the Court. Whether this order is one which from that point of view, a Judge or the Master had power to make, is a question which was not raised in this appeal.

The only order I make is to dismiss the appeal.

This decision was appealed from to the Queen's Bench Divisional Court, and was argued in appeal by the same counsel, but judgment was never delivered, as a settlement of the litigation between the parties (including the question of costs,) made it unnecessary.

[See *Edwards v. Hope*, 14 Q. B. D. 922 (C. A.)—REP.]

RE RYAN.

Toronto agents—Lien on fund in Court.

The Toronto agents of a deceased solicitor were held entitled to a lien on a sum of money in Court to the credit of this matter, to which the solicitor was entitled for his costs, to the extent of their unpaid agency bill of charges in this matter, and it was ordered that their bill should be paid out of the fund in priority to the claims of the other creditors of the solicitor.

[June 30, 1885—*Ferguson, J.*]

THIS was a motion on behalf of Thomas Johnston, a creditor of one McMahon, deceased, who in his lifetime was solicitor in this matter for J. S. Ryan, for payment, out of the moneys in Court to the credit of this matter to the said Thomas Johnston, of \$532, the amount to which McMahon was entitled for his taxed costs in this matter, or to transfer this amount to the credit of the administration proceeding, *Re McMahon*.

It was shewn that there was a deficiency of assets of the estate of McMahon, and there was no dispute as to the right of the creditors to the money in question as against McMahon's representatives; but the Toronto agents of McMahon asserted a lien for their agency bill, consisting of charges for services rendered in *Re Ryan*, only, upon this fund, and obtained a stop order. On the return of this motion the Toronto agents, Messrs. Foster, Clarke, & Bowes, asked to have their lien declared and the amount of their bill paid out of the \$532.

Holman, for Thomas Johnston.

W. A. Foster, for Foster, Clarke, & Bowes.

The following authorities were referred to: *Ross v. McLay*, 7 P. R. 97; *Shaw v. Neale*, 6 H. L. C. 581; *Re Cross*, 4 Chy. Chamb. R. 11; *Re Attorney*, 7 P. R. 311; *Lawrence v. Fletcher*, 12 Ch. D. 858; *Re Johnson*, 30 W. R. 14; *McPhatter v. Blue*, 15 C. L. J. 162; *Clark v. Eccles*, 3 Ch. Chamb. R. 324; *Bank of Commerce v. Crouch*, 8

P. R. 437; *Dawson v. Moffatt*, 10 P. R. 366; *Wardell v. Trenouth*, 8 P. R. 142.

FERGUSON, J.—I make an order declaring that the town agents, Messrs. Foster, Clarke, & Bowes, have the lien on the moneys that they contend for, and for the payment out to them of the proper sum, which sum will be ascertained and inserted in the order, and for the transfer of the balance of the sum to the credit of the administration matter.

ORPEN V. KERR.

Examination—Production of documents—Special examiner—Rule 285, O. J. A.—G. O. Chy. 147.

The powers of the special examiner under G. O. Chy. 147, as to directing the production of documents, extend to examinations under Rule 285, O. J. A.

Upon an examination of a party under Rule 285, at a stage of the action earlier than an examination will be ordered as of course, only material documents should be produced, such as would be produced in the ordinary course at a later stage.

[October 14, 1885.—*Boyd, C.*]

A motion by the plaintiff to commit the defendant for refusal to produce his books upon an examination, or in the alternative to compel him to attend at his own expense for re-examination and to make production.

The examination was taken before a special examiner under an order of the Master-in-Chambers made under Rule 285, O. J. A., before appearance in the action. The examiner directed that the defendant should produce his books, and adjourned the examination for that purpose, but after the adjournment the defendant refused to produce.

The question argued was, whether the practice laid down in *Lavery v. Wolfe*, 10 P. R. 488, applied to an examination of this kind.

A. H. Meyers, for the plaintiff.

C. H. Ritchie, for the defendant.

BOYD, C.—Referring to the English original of our Rule 285, Kay, J., said in *Raymond v. Tapson*, 22 Ch. D. 430, 432: “It plainly was intended to be an enabling clause to provide for the taking of evidence in cases where the ordinary practice did not provide for it.”

That being so, the order is to be so worked out in practice that it shall not prove inefficacious. Here an order was made for the examination of the defendant before appearance, and during the course of the examination the officer who conducted the examination directed the production of books and papers. This was not appealed from, and I must therefore take it to have been a proper direction, if there was authority to make it. Considering the way in which the new practice introduced by the Judicature Act has been developed by the Judges, it is not improper now to hold that the powers of the special examiner under General Order 147, extend to the examination under Rule 285. It cannot be that such an examination is to be blocked because of the refusal of the party examined to produce a material document or book. There would be in such a case certainly the power to apply for a special order under Rule 221; but it is more convenient, because more simple and less expensive, to allow the officer who examines to direct or order the production of such documents. In *Regina v. Justices of Pirehill*, 14 Q. B. D. 13, Brett, M. R., says (p. 17): “Whenever a question of mere procedure arises, and the point is, whether the Judicature Act has failed to simplify the procedure, our duty is, to my mind, to advance the remedy given by that Act, and to assume, if we can, that in every case in which it is possible to do so, the Judicature Act meant to simplify proceedings.” See also *Attorney-General v. Metropolitan District R. W. Co.*, 5 Ex. D. 218. Of course only material documents should be produced, such as would be produced as of course later on in the action. It may

be that the scope of the examiner's direction in this case is too wide, but I do not deal with that because it has not been appealed from. As the point is a new one, I give no costs, but order the person being examined to attend for further examination, and to make the necessary productions before the examiner at his own expense.

WALLER V. CLARIS.

Notice of motion—Irregularity—Costs.

Where the defendant's solicitor was served with a short notice of motion, which was admitted to be defective.

Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to shew that the notice was irregular.

[October 12, 1885.—*Wilson*, C. J.]

AN *ex parte* injunction was obtained for one week by the plaintiff on the 15th of September, 1885.

On the 21st of September, 1885, the plaintiff's solicitor served notice of motion to continue the injunction on the defendant's solicitor for the 22nd of September.

The defendant's counsel attended upon it, and the question was argued, whether the latter was entitled to the costs of attending to shew that the notice was irregular or defective, the plaintiff's counsel admitting the irregularity.

F. E. Hodgins, for the defendant.

Hoyles, for the plaintiff.

WILSON, C. J.—The following cases were referred to: *Fisken v. Smith*, 3 Ch. Chamb. R. 74. There, the objection was, that the notice of motion did not allow four days between the service and the motion, and costs were claimed in accordance with *Robertson v. Grant*, in which it was held that a party appearing to ask costs of an

irregular notice, did not waive the irregularity, and the motion was refused with costs. *Robertson v. Grant*, 3 Ch. Chamb. R. 331, shews that a party unnecessary to the proceedings, who is served with a notice of motion, is entitled to attend, and will be allowed his costs of attendance. *Clark v. Simpson*, L. R. 6 Eq. 336, was referred to on the point.

In that case Malins, V. C., said (p. 337): "Whatever may be the practice in other branches of the Court," [that was said in answer to the statement as to the practice in the Rolls, *Morgan & Davey's* costs in Chy. 43-4,] "it has always been my practice and I shall continue to act upon it until I find it otherwise decided by higher authority, to allow a person who is served with a petition, and at the hearing claims no interest, his costs of appearance. I do not see why a person who is served, is to judge whether or not he is unnecessarily served."

In *Lucas v. Fraser*, 9 P. R. 319, a person of the same name as the defendant, who was served by mistake with the writ in the action, was held entitled to his costs of opposing a motion for judgment under Rule 324 of the Judicature Act.

The Master in Chambers said the party did not appear merely to ask for his costs, but *quia timet* an order would be made against him. He referred to *The Great North Committee v. Inett*, 2 Q. B. D. 284; *Campbell v. Holyland*, 7^a Ch. D. at p. 175. In the first of these cases it appeared that Justices stated a case for the Court, but the appellant had not transmitted the case to the Court within three days after receiving it as required by the Act. The Court had, therefore, no jurisdiction. The respondent applied to the Court to strike the case out of the paper, and he asked for the costs of his appearance. *Peacock v. The Queen*, 4 C. B. N. S. 264, was cited against him, where the Court said, as they had no jurisdiction to hear the case, they had no jurisdiction to give costs. *Brown v. Shaw*, 1 Ex. D. 425, is to the same effect. *Diss Urban Sanitary Authority v. Aldrich*, 2 Q. B. D. 179. See note 3 at p.

285, as to the disposal of the costs in the case reported at 179. It is said the Court gave the respondent his costs in the case reported at p. 179, after time taken to hear the parties on the point. It was also argued that where a person comes before the Court he submits to the general jurisdiction of the Court: *Peters v. Sheehan*, 10 M. & W. 213.

Cockburn, C. J., then in the case at p. 285, said: "It is clear that in this case the conditions precedent to the exercise of the jurisdiction have not been complied with. The respondent is entitled to avail himself of this objection, and he is obliged to come here to inform us of the absence of jurisdiction, for if he did not, the objection would not appear, and judgment would be given against him. As he is obliged to come here by the act of the appellants, he is entitled to his costs. It is clear, that to some extent, there is jurisdiction over the subject matter, for the Court has jurisdiction to hear and determine whether the appeal will lie or not. I am of opinion, that, under these circumstances, there is jurisdiction to give costs."

In *Campbell v. Holyland*, 7 Ch. D. 166, above mentioned, a mortgagee, who had parted with his interest after foreclosure, was served with a notice to have the foreclosure opened, appeared and asked for his costs. Jessel, M. R., at p. 175, said: "I have said many times * * that I do not recognize what some Judges have said is the rule, that every party served is entitled to appear merely to ask for his costs. It does not appear to me that, in any event, the plaintiff could have any interest whatever in this question, and therefore I shall not give him costs of any appearance." The M. R. allowed, however, forty shillings costs, as no intimation was given to the plaintiff that he must not appear, and no tender was made to meet the cost of being advised as to the effect of the notice."

In *Forrest v. Davis*, 26 W. R. 534, "An order in Chambers was made on the 14th, and notice of motion was given on the 19th for the 21st [thus not allowing two clear days' notice,] or such other day as counsel can be heard. Held

the motion could be properly made on the 22nd, which was the eighth and last day for the motion."

So here the notice to continue the injunction was drawn in like manner, that a motion would be made for that purpose on the 22nd September, "or so soon thereafter as the motion can be heard," and that it might therefore have been made on the day after, and so the notice would have been regular. *Deykin v. Coleman*, 25 W. R. 294, was therefore not followed: 36 L. T. 195.

The case of *Dawson v. Beeson*, 22 Ch. D. 504, shews that where a party applies for special leave to serve short notice of motion he must distinctly state to the Court that the notice applied for is short; and the same must distinctly appear on the face of the notice served on the other party, so that the person served should understand not only that he was to appear on the day appointed, but that leave had been given to serve the notice short of the two clear days which he would otherwise have been entitled to. But the Court may disregard irregularities and decide on the material question. See our Rule 473. Cotton, L. J., said, (p. 510:) "If the matter rested on this question alone, I think the defendant would be entitled to have the order discharged. But I do not think we ought to dispose of it on that ground. I am not myself inclined to allow a party to take advantage of technical objections when he has not been deprived of the opportunity of defending himself."

In *Daubney v. Shuttleworth*, 1 Ex. D. 53, notice of motion served on the 20th for the 22nd of December, was held, bad, because there was not two clear days' notice given there, the defendants were not bound to appear to it, and the motion for costs was therefore refused.

Some of these cases shew, that a notice served without allowing the full two days clear time, and without shewing that a short notice has been allowed, is irregular. Costs were given on the party served appearing and claiming them in *Fisken v. Smith*, 3 Ch. Chamb. R. 74; *Robertson v. Grant*, 3 Ch. Chamb. R. 331; *Clark v. Simpson*, L. R. 6 Eq., 336.

The case of *Daubney v. Shuttleworth*, 1 Ex. D. 53, shews costs will not be given; and *Dawson v. Beeson*, 22 Ch. D. 504, shews the Court may disregard the irregularity, and hear the parties on the merits if the party served has appeared, and is afforded the opportunity of defending himself.

Where a wrong party is served with a writ of summons, bearing the same name as the real defendant, he is entitled to have the service set aside, and he must move against it, and must also be allowed his costs. So, if from the want of due attention to the requirements of a statute, the Court has not acquired jurisdiction of the cause, the party to be affected by such proceedings taken adversely to him, must appear and must of course be entitled to his costs on showing the default or neglect of the other party, as in the *Great North Committee v. Inett*, 2 Q. B. D. 284.

Here the defendant had the opportunity of being heard as he appeared, although he was not bound to appear, and the Court might have passed over the irregularity upon his appearance.

The defendant did not defend himself. He appeared only to ask for costs, and I do not think he is of right entitled to them. I refuse the claim for costs.

SERVOS V. SERVOS.

Venue—Preponderance of convenience.

In an action by a husband against his wife to enforce a charge on land, the cause of action arose at Hamilton, where also the parties and their respective solicitors and all the witnesses resided, but the plaintiff proposed to have the action tried at Toronto. The increase in expense of a trial at Toronto over one at Hamilton was estimated by the defendant at between \$50 and \$75, and by the plaintiff at about \$30.

Held, that there was an exceeding preponderance of convenience in favor of Hamilton, and it was ordered that the place of trial should be changed, unless the plaintiff at once paid into Court \$40 to meet the defendant's additional expense.

[October 26, 1885.—*Boyd*, C.]

THIS was an action by a husband against his wife to enforce an alleged charge upon the wife's property for money advanced by the husband towards the purchase.

The action was begun by writ issued at Hamilton in March, 1885, but the statement of claim was not delivered till September, 1885, and the place of trial then proposed was Toronto, as it was too late to get down to the Hamilton Sittings.

Both plaintiff and defendant and their respective solicitors lived at Hamilton, where also the cause of action arose.

The defendant made a motion to change the place of trial to Hamilton, swearing in her affidavit that she had sixteen witnesses there; that she believed that if the plaintiff had any witnesses they would also be persons living in Hamilton, and that in her belief a trial in Toronto would cost from \$50 to \$75 more than in Hamilton. This was not contradicted by the plaintiff, who filed no affidavit.

The local Master at Hamilton refused to make the change, and the defendant appealed.

Shepley, for the appeal.

Holman, contra. The difference in expense can not be more than \$30, and that is not sufficient to compel a change of venue. The cause of action is not an element to be

considered. There is not a preponderance of convenience in favor of Hamilton: *Slater v. Purvis*, 10 P. R. 604; *Walton v. Wideman*, 10 P. R. 228, and cases there cited.

BOYD, C.—This is a plain enough case of exceeding preponderance of convenience in favor of Hamilton. The cause of action arose, and the place of abode of the parties and their solicitors and witnesses is at Hamilton, and the case ought to be tried in its own county. The difference in expense is put by the defendant at from \$50 to \$75, and this is not contradicted. Besides the travelling expenses the *per diem* allowance to witnesses brought from Hamilton to Toronto would be twenty-five cents more than if they were examined at Hamilton. The only thing that influences me against the application is the delay of the trial till the spring, the Hamilton autumn sittings being over, but I shall not regard this, as the plaintiff has also delayed, and thereby missed two sittings at Hamilton. I think, too, that in a case between husband and wife the wife ought to be leniently dealt with. Unless the plaintiff at once pays into Court \$40 to meet the additional expenses of the defendant of trying the case at Toronto, I will allow the appeal, and change the venue as asked.

BARBER V. BARBER.

Vendor and Purchaser—Compensation—Vesting order—Advertisement—Judicial sale.

The advertisement of a judicial sale stated that the property was in possession of a tenant, who would permit the purchaser to obtain possession on the 1st of November. The purchaser, however, was prevented by the tenant from taking possession till the month of January following. About the middle of November the purchaser obtained a vesting order: *Held*, that the purchaser was entitled to compensation from the vendor for being kept out of possession, and that he had not waived his right by taking a vesting order. The failure to give possession was a breach of the representation in the advertisement, a representation on account of which it was to be assumed that the purchase money was greater than it would otherwise have been.

[September 21, 1885.—*Ferguson, J.*]

THIS was an application on behalf of George Scott, a purchaser of land in this suit, for a reference to the Local Master at Owen Sound, to ascertain the amount of compensation to which he was entitled for being kept out of possession of the lands purchased by him, from the 1st of November, 1884, until January of the following year, and for payment of the amount so ascertained out of moneys in Court to the credit of the cause. The property had been advertised for sale, and the following statement appeared in the advertisement: "The property is now in the occupation of a tenant who will permit the purchaser to obtain possession after harvest, as an incoming tenant and to take full and complete possession of the property and all buildings thereon on or before the 1st day of November next."

It appeared that Nathaniel Barber, one of the defendants, was the tenant in possession of the property at the time of the sale, under a lease which expired on the 1st of November. He refused to go out of possession, and prevented the purchaser from obtaining possession until the month of January following. About the middle of November the purchaser obtained a vesting order.

Hoyles, for the purchaser, cited *Manson v. Manson*, 10 P. R. 155 ; *Thomas v. Buxton*, L. R. 8 Eq. 120 ; *Stewart v. Hunter*, 2 Ch. Chamb. R. 335 ; *Turrill v. Turrill*, 7 P. R. 142 ; *Fleming v. McDougall*, 8 P. R. 200 ; *Palmer v. Johnson*, 13 Q. B. D. 351.

Holman, for the plaintiff. The applicant purchased subject to the tenancy of Nathaniel Barber expiring on the 1st of November. The tenant is a wrong doer, and the purchaser must seek his remedy against him for damages. The purchaser had full notice, in the advertisement, of an existing tenancy; he purchased subject to that tenancy, which he knew was not to expire until the 1st of November. The statement in the advertisement was strictly true. The tenant was bound under the terms of his tenancy to let the purchaser into possession as therein stated. The purchaser after having been refused possession by the tenant, obtained his vesting order about the middle of November, and consequently it is now too late to ask compensation. The delay has been very great. In *Manson v. Manson*, no vesting order had been granted. I refer to *Bull v. Harper*, 6 P. R. 136 ; *Follis v. Porter*, 11 Gr. 442 ; *Allen v. Richardson*, 13 Ch. D. 524 ; *McCall v. Faithorne*, 10 Gr. 324.

FERGUSON, J.—The matter in respect of which the purchaser now claims compensation, and to have the amount of compensation paid to him out of the moneys in Court, does not appear to me to be a matter that would be necessarily embraced in or concluded by his taking and accepting a conveyance without covenants, and I am of the opinion that the rule referred to in *Dinsmore v. Shackleton*, 26 C. P. 604, and the cases and authorities referred to in the judgment in that case do not apply to this case. I think it rather a breach of a representation made in the advertisement settled by the Court, a representation, statement, or promise on account of which it is to be assumed that the purchase money is greater than it would otherwise have been. The purchase money is still in Court,

and there seems nothing in the way of doing complete justice. The delay, which at first I thought much in the way of the applicant, cannot, I think, defeat his right. I think the order asked may be granted; the applicant to have his costs out of the moneys in Court; the guardian also to have his costs out of the estate; also the plaintiff and Samuel Barber. The order is without prejudice to any claim or proceeding against the tenant.

WALMSLEY V. GRIFFITH ET AL.

Security for costs—Co-defendant—Counter-claim.

A defendant asking relief against his co-defendant will not be ordered to give security for costs on the ground of residence out of the jurisdiction. *Seemle*, such relief should not be asked by way of counter-claim.

[November 10, 1885.—*The Master-in-Chambers.*]

A MOTION on behalf of the defendant Webster for security for costs from the defendant Hall, who had filed a counter-claim against the defendant Webster, upon the ground that the defendant Hall resided out of the jurisdiction.

J. R. Roaf, for the motion.

Echlin, contra.

THE MASTER-IN-CHAMBERS.—The motion now is for security for costs.

There cannot be such security ordered for a defendant, as against his co-defendant, *Re Percy*, 2 Ch. D. 531, *Furness v. Booth*, 4 Ch. D. 586.

Here, no doubt, the form of the defendant Hall's pleading against his co-defendant Webster, as a counter-claim

is not according to rule. There is no motion against that pleading, and substantially it is right enough. Defendant Hall has a right to ask relief against Webster in this suit on the grounds he has put forth. See *Campbell v. Robinson*, 27 Gr. 634; and his pleading being a counter-claim is perhaps of no substantial consequence, at any rate it is of no consequence on this motion. I must dismiss this motion with costs, as far as security for costs is concerned. Defendant Webster may have any necessary time to answer.

SNIDER V. SNIDER.

SNIDER v. ORR ET AL.

Alimony and fraudulent conveyance—Separate actions—Multiplication of orders—Costs—Taxation—Rules 447-9—Local officer—Revision—48 Vic. ch. 13, sec. 22, (O.)—Special circumstances—Striking out pleading—Disbursements—Desertion—Offer to receive wife back.

Claims on behalf of a wife for alimony and to set aside a conveyance of the husband's property as fraudulent should be joined in one action. Separate actions were brought for such claims, the five defendants appearing by the same solicitors, and filing separate statements of defence. A paragraph of each of the defences submitted that "the plaintiff had made out no case entitling her to relief." This was struck out by a local Master, by five separate orders to the same effect.

Held, that the paragraph was neither scandalous, nor prejudicial, nor embarrassing under Rule 178, but was a mere reference to section 44 of the Judicature Act, and should not have been struck out, and the costs of only one order were allowed.

Rules 447-449 are not necessarily applicable to a taxation had under 48 Vic. ch. 13, sec. 22, (O.) and where upon a taxation by a local officer, these rules had not been complied with by the party objecting to the taxation, a revision was nevertheless ordered, the Court thinking the bill so exorbitant as to show special circumstances.

Held, also, that a wife was not entitled to interim alimony and disbursements where she sued on the ground of desertion, not alleging cruelty, and where the husband offered by his defence and by affidavit to resume cohabitation with her.

Remarks upon the multiplication of orders and summonses in action.

[November 4, 1885.—*Boyd, C.*]

THE first action was for alimony, and the second was a suit, by the plaintiff in the first case, to set aside a conveyance of property by her husband to the other defendants (three in number) as fraudulent and void. The defendants all appeared by the same firm of solicitors, but filed separate statements of defence. There were accordingly in the two actions five statements of defence in each of which there was a paragraph submitting that "the plaintiff had made out no case entitling her to relief."

The local Master at Chatham made orders striking out this paragraph from each of the defences with costs, a separate application having been made as to each defence, a separate summons and order taken out, and a separate taxation of costs had.

The defendants now appealed from these orders and the taxation of costs under them, and also from another order of the same Master directing the defendant Snider to pay the plaintiff \$5 a week *interim* alimony, and a sum for counsel fees and prospective disbursements.

As to two of the orders, viz., those striking out paragraphs of the defences of the defendant Snider in the two actions, the appeal was brought on too late.

Shepley, for the appeal.

E. Douglas, Armour contra.

BOYD, C.—To the intelligent layman (who is sometimes invoked by the Judges) there would be something startling in the information that the defendants in these actions, having, by their defences, submitted that "the plaintiff had made out no case entitling her to relief against them," should have been obliged to expunge that statement with an amercement of costs to the extent of \$85.

There was no need to bring separate actions: both might have been included in one writ and record: *Campbell v. Campbell*, 29 Gr. 252. In that event, one motion instead of five would have sufficed

to bring the inculpatcd pleadings under the notice of the Master. But on the merits no order should have been made to strike out this submission of the pleader. It may be superfluous, but it is neither scandalous, nor prejudicial, nor embarrassing under Rule 178. It is in truth but an allusion to or an invocation of the statute (Jud. Act, sec. 44) which declares that no party shall be entitled to judgment on the ground of his pleading being true, if the facts proved are not sufficient in point of law to entitle him to judgment. The modern practice is to discourage applications merely technical and unmeritorious, and even if successful not to reward them by exemplary costs.

It is too late now to set aside the two orders made in September, but the taxation thereunder should be revised by the officer at Toronto, on the general ground of exorbitance, as only one set of strictly taxed costs should have been allowed: *Spence v. Clemow*, 15 Gr. 584. I am not disposed to hold the appellant to the terms of Rules 447-449, which are not necessarily applicable to this taxation, which was had under the powers conferred by 48 Vic. ch. 13, sec. 22 (O.) In my view such special circumstances exist as take it out of the usual rules: as was held in *Stewart v. Jarvis*, 27 U. C. R. 467.

This multiplication of summonses and orders in respect of the same subject matter is such a practice as I hope will not be repeated. In analogous circumstances Kelly, C.B., said that the proceedings were in effect oppressive and vexatious, although the plaintiff's attorney may not have intended to act unfairly: *Jackson v. Freeman*, 20 W. R. 683. See also *Gueret v. Young*, Bittleston R. 51, Field, J.

I will give the solicitor so far the benefit of the doubt in this case that I will not order the costs of this appeal against him personally, but he must repay the costs received, so far as the taxing officer certifies over payment.

As to the order for interim alimony, it should not be upheld. The plaintiff's case rests on alleged desertion by the husband—no cruelty is pleaded. The husband is

willing and offers, both by defence and by affidavit, to resume cohabitation with the wife, who is still living in his house.

If she accepts this offer, the action is at an end: if she refuses it, then she is at fault, and he is no longer guilty of desertion: *Ousey v. Ousey*, 22 W. R. 556, S. C., L. R. 3 P. & M. 223. With this order also falls the direction to pay the large sum of \$147 for counsel fees and prospective disbursements. It is not needful now to consider whether this peculiar and sometimes abused privilege of the wife should be any longer upheld, in view of her emancipated status under the late Married Women's Act; suffice it to say that in this case she ought not to enjoy that privilege.

The last four orders to strike out the passage quoted from the defences are set aside, as also the order for interim alimony and disbursements.

LALONDE V. LALONDE.

Interim alimony—Desertion—Occupation of homestead by wife—Interim disbursements—Counsel fee—Solicitor as counsel.

An order of a Local Master directing the defendant in an alimony action based upon desertion to pay interim alimony, was affirmed, though the wife was in occupation of the defendant's homestead; she having established that she was in need of interim alimony, and the defendant not shewing that she was in receipt of any income from the farm.

An order directing the defendant to pay forthwith interim disbursements was affirmed, except as to the counsel fee to be paid to the plaintiff's solicitor, who intended to act as counsel at the trial.

[November 9, 1885.—*Proudfoot, J.*]

AN appeal by the defendant in an alimony suit from the order of the Local Master at Chatham, directing the defendant to pay the plaintiff \$5 a week interim alimony, and also the plaintiff's solicitor's actual and prospective disbursements. It was shewn that the plaintiff was in pos-

session of the homestead, the husband having deserted her, but defendant failed to shew that she was deriving any income from the property;

Holman, for the appeal.

E. Douglas Armour, contra.

Smith v. Smith, 6 P. R. 51; *Haffey v. Haffey*, 7 P. R. 137; *Ingram v. Ingram*, 10 P. R. 569; *Magurn v. Magurn*, 10 P. R. 570; *Bradley v. Bradley*, 10 P. R. 571; *Turnbull v. Forman*, 15 Q. B. D. 234; *Scott v. Wye*, 11 P. R. 93, were referred to.

PROUDFOOT, J.—I shall not interfere with the order upon the ground taken as to the altered status of married women under the Married Women's Property Act, 1884, or with the discretion of the Master in ordering interim alimony, although the plaintiff was in possession of the homestead. However, I shall set aside so much of the order as directs the payment of a sum of \$40 to the plaintiff's solicitor as a prospective disbursement for counsel fee, as it is alleged and not denied that one of the firm of plaintiff's solicitors is to act as counsel. I do not lay down any general rule as to this; each case must stand on its own circumstances; and in this one I do not think the disbursements should be increased.

BANK OF HAMILTON V. HARVEY.

Signing judgment—Interest—Duty of clerk.

In an action on a promissory note the plaintiffs, in their statement of claim, claimed interest at the rate of seven per cent., without shewing any legal right to more than six per cent. The statement of defence having been held bad on demurrer, and leave to amend not having been asked or granted, the plaintiffs entered judgment for default of defence for the full amount of the principal and interest claimed.

Held, that it was the duty of the deputy clerk at the office where judgment was signed not to permit judgment to be entered for what the plaintiffs were not entitled to, and that there was no objection to the plaintiffs limiting their claim to six per cent. on signing judgment.

[November 10, 1885.—*Osler, J. A.*]

THIS was an action on a promissory note. The defendant filed a statement of defence, which was held bad on demurrer, and leave to amend not being asked or granted the plaintiffs issued judgment at the office of the deputy clerk at Hamilton as for default of defence. The statement of claim asked interest at the rate of seven per cent. per annum, but alleged nothing which would legally entitle the plaintiffs to claim more than six per cent. The judgment was signed for the amount of principal claimed and interest at seven per cent. The defendant now moved (pending an appeal to the Court of Appeal from the order allowing the demurrer) to set aside the judgment and to be allowed to file a new defence, on the ground of irregularity and upon the merits.

Aylesworth, for the motion.

Holman, contra.

OSLER, J. A.—The defendant makes out a sufficient case to be allowed to come in and plead on the merits. The only question is, as to the costs of the proceedings. The judgment has been signed for about \$200 too much, the plaintiffs having claimed in the statement of claim interest at the rate of seven per cent., without shewing any legal right to charge that rate or more than six per

cent. See *Bleakley v. Easton*, 22 U. C. R. 348. It is said that the deputy clerk refused to sign judgment for less than the amount claimed. In this he was in error. He should see that the plaintiff takes judgment for *no more* than he has claimed, but it is also his duty not to permit judgment to be signed for what the plaintiff is not entitled to. There was no possible objection to the plaintiffs here limiting their claim to the rate of six per cent. when they came to sign judgment. The plaintiffs' proceedings are therefore irregular, and if the motion had been confined to the setting them aside on this ground, the defendant would have been entitled to the costs of the motion and they would have been amended. But the substantial object of the application, namely, to be let in to plead is granted as an indulgence to the defendant. The usual rule in such cases is that neither party receives costs.

The order, therefore, will be to set aside the judgment and other proceedings without costs and to let the defendant in to defend, the security already given on his appeal to the Court of Appeal to stand as security for any final judgment for the plaintiffs in the cause. But I think it ought to be a term that the appeal is not to be brought to hearing pending the trial, the result of which may shew that the appeal is unnecessary.

WALMSLEY V. GRIFFITH ET AL.

Appeal—Time—Sec. 25, “Supreme and Exchequer Court Act.”

The thirty days' time allowed for appealing to the Supreme Court of Canada under sec. 25 of “The Supreme and Exchequer Court Act” commences to run on the issuing of the certificate of the Court of Appeal.

[November 24, 1885.—*The Court of Appeal.*]

JUDGMENT was delivered in this Court on the 15th October, 1884 (10 A. R. 327), allowing the defendants' appeal, and reversing the judgment of the Court below. The certificate of such judgment was issued on the 16th December, 1884.

On the 15th January, 1885, application was made by the plaintiff *ex parte* to BURTON, J. A., in Chambers to allow an appeal to the Supreme Court of Canada.

The question whether the thirty days for appealing to the Supreme Court of Canada, under sec. 25 of the S. C. Act, ran from the pronouncing or the entry of the judgment appealed from being then before the Supreme Court in the case of *O'Sullivan v. Harty*, noted 22 C. L. J. 193, and 5 C. L. T. 275, the application to Burton, J. A., was ordered to stand over till judgment was given in *O'Sullivan v. Harty*, and was not disposed of till the 4th of November, 1885, when the order applied for was granted. The sum of \$500 was then on the same day paid into Court as security for the appeal to the Supreme Court. The defendants on the 17th of November, 1885, moved* to rescind the order of Burton, J. A.

Arnoldi and *J. A. Paterson* for the motion.

J. B. Clarke contra.

The judgment of the Court was delivered by HAGARTY, C. J. O. The question for our decision is, in substance, whether, notwithstanding the lapse of time, the plaintiff

**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, OSLER, JJ. A.

should be allowed to appeal to the Supreme Court. It comes up in the form of a motion to rescind the order of Burton, J. A., allowing the payment into Court of a sum of money instead of the ordinary security by bond. A long time had elapsed between the application for and the making of the order in question. This delay arose from some difficulty in obtaining a reliable statement of the grounds on which the Supreme Court decided an application in the case of *O'Sullivan v. Harty* as to the construction of the statutory provisions for regulating the time for appeal, and cannot be allowed to prejudice the plaintiff.

In accordance with the decision of the Supreme Court in *O'Sullivan v. Harty*, the thirty days will in this and in all cases be computed from the issuing of the certificate. The application to Mr. Justice Burton was, therefore, in time, and this motion would fail on that ground, even if the decision in *Neill v. Travelers Ins. Co.*, 9 A. R. 54, were not in the defendants' way.

Motion refused, without costs.

CONMEE ET AL. v. CANADIAN PACIFIC R. W. CO.

CANADIAN PACIFIC R. W. CO. v. CONMEE ET AL.

*Jury notice—Cause of action—Injunction—Reference—Burden of proof—
Cross-action—Counter-claim—Staying proceedings.*

C. & M. were contractors for building the Canadian Pacific Railway, and sued the company for \$200,000, the balance alleged to be due upon their contract, the writ in their action having issued on the 5th of October, 1885, in the Queen's Bench Division. On the 31st October, 1885, the Railway Company began an action in the Chancery Division against C. & M., to recover \$600,000, alleged to have been over-paid them, setting up that the measurements and progress certificates on which the payments were made had been obtained by fraud, and seeking the cancellation of these certificates, and an injunction to restrain the contractors from receiving a final certificate. The company did not counter-claim in the action brought by C. & M., and the latter delivered a jury notice in the action in the Chancery Division.

The Master-in-Chambers struck out the jury notice, and, on an application by each party to stay the other's action, ordered the contractors' action to be stayed, but allowed the company's action to proceed. On appeal from these orders by the contractors, *Boyd, C.*,

Held, that the action of the company was one which, as of course, would have been begun prior to the Judicature Act by a bill in Chancery, although it might have been possible to recover in a common law forum; it was also a case in which it was to be expected that a reference to take the accounts would be directed at some stage, and that difficult and complicated questions of law and fact would arise at the trial, which could be much better dealt with by a Judge than a jury; he therefore dismissed the appeal from the order striking out the jury notice.

Held, also, that, as there was a large burden of proof upon the company, and no vexation or impropriety in their seeking to unravel the alleged fraudulent transactions, and as they were not advancing a counter-claim in the action brought by C. & M., the company's action should not be stayed till the final determination of the other action, but that the trial of the company's action was the proper preliminary step in endeavouring to adjust the rights of the parties, and should take place first.

Taylor v. Bradford, 9 P. R. 350, distinguished.

ROSE, J., also dismissed the appeal from the order staying the contractors' action.

[November 17 and 21, 1885.—*The Master-in-Chambers.*]

[December 2, 1885.—*Boyd, C.*]

[December 5, 1885.—*Rose, J.*]

ON the 5th of October, 1885, Conmee and McLellan, who were contractors for the building of the railway, began the firstly above named action in the Queen's Bench Division against the Canadian Pacific Railway Company, to recover \$200,000, alleged to be the balance due them upon their contract.

On the 31st of October, 1885, the company began the second action in the Chancery Division against the contractors to recover \$600,000, alleged to have been overpaid them, the company setting up that the measurements and progress certificates on which the payments were made had been obtained by fraud, and seeking the cancellation of the progress certificates, and to restrain the contractors from receiving a final certificate.

On the 17th November, 1885, the Master in Chambers made an order striking out the jury notice filed and served by the defendants in the action in the Chancery Division.

On the 20th November, 1885, the contractors moved to stay the action in the Chancery Division until after the final determination of their action in the Queen's Bench Division; and on the same day the company made a similar motion as to the action in the Queen's Bench Division.

Osler, Q. C., and Wallace Nesbitt for Conmee & McLellan.

Moss, Q. C., and R. M. Wells, for the Canadian Pacific Railway Company.

THE MASTER-IN-CHAMBERS.—When a motion was made a few days ago in the Chancery case, by the Canadian Pacific Railway Company, to set aside a jury notice filed in that case, I thought *Pawson v. The Merchants Bank*, 11 P. R. 72, conclusive—that the Company's claim in that first mentioned case was, in the sense of sec. 45, exclusively a Chancery case, and that, although on a large view the facts, it might be that justice could be worked out between the parties as to the claims of both of them, in an action framed as Conmee's present action is framed, yet it was for no one to dictate to the Company the form in which they should put their case, and so I struck out the jury notice.

And now, assuming for the present that justice might be worked out as to all parties, in either of the present suits,

which I think is possible, it is then for me to consider what test I must apply in deciding the present motions.

1. Conmee's action was first commenced.

2. The amount sought by Conmee is \$200,000. The claim of the Company is, that that \$200,000 is not justly due to Conmee, and that they have overpaid him, through the facts which are described, to the extent of \$600,000, which they demand shall be repaid.

3. Then on whom is the burden of proof? As to this last, I have read the contract, and the result is, that I think much more of the replication of Conmee than I did yesterday. I very much agree with the gentleman who drew that replication, as to the effect of those progress certificates, and the payments made by the Company under them.

It is very desirable that I should give judgment at once; and circumstances have rendered it impossible for me to analyse the provisions of the contract as I might otherwise have done. I shall content myself with referring at present to the several clauses of the contract that strike me as important, and stating my opinion as to the general result which follows from them, upon the question so important on these motions. Upon which party is the burden of proof? One fact came out upon the argument yesterday—not, that I know of, formally stated on the papers—that the payment of those progress certificates had been made through the general manager of the Company, mentioned in the contract.

I refer to clauses 1, 22, 23, 24, 25, of the contract.

And the conclusion I draw from them, together with the other facts that are apparent in this case, is, that the burden of proof is on the Company altogether, as to the greater portion of the claims in this action.

For suppose Conmee to prove at the trial the certificates made by the assistants of the manager mentioned in the 1st clause, the payment, without objection or saving of any kind, of those certificates by the Company, *made by the manager himself*, with money sent to him by the Com-

pany from Montreal for that purpose. That would do on Conmee's part for the ten per cent., I think. But much more would it certainly do to prevent the Company recovering back the alleged overpayment of \$600,000, which they claim that they have made to the contractors. For, under such evidence, never could the Company hope to recover back that money, without, by evidence, falsifying those certificates. It may be on the ground of fraud, or mistake, or some other ground which I cannot imagine, but it is clear to me that they must falsify those certificates or they never can succeed.

To do that it lies upon the Company to go into the whole transaction from the beginning.

As to the amount beyond the ten per cent. which Conmee claims, of course, he would have to prove the work done since the last certificate.

I do not wish to be taken as considering lightly the difference in the amount of the claims of the parties. I think it is important on this motion. Besides resisting the \$200,000 claim, the Company assert a claim against the contractors to three times that amount, and when these proportions concern hundreds of thousands of dollars, I cannot think the difference unimportant in determining which party shall have control of the proceedings as plaintiff.

In view of the two points I have last spoken of, I think the priority in the commencement of the suit quite insignificant.

Order made staying action in Queen's Bench Division, and allowing action in Chancery Division to proceed.

Conmee and McLellan now appealed to a Judge of the Chancery Division from (1) the order of the Master striking out their jury notice, and (2) the order of the Master refusing to stay proceedings in the action in the Chancery Division.

*McCarthy, Q. C., and Wallace Nesbitt, for the appellants
Moss, Q. C., and R. M. Wells, for the respondents.*

BOYD, C.—If a case is to be tried by a Judge, and not by a jury, I very much agree with the view of Holker, L. J., in *Thomson v. S. E. R. W. Co.*, 9 Q. B. D. at p. 334, that the right to have the first and last words is no very substantial advantage. Who shall be plaintiff and who defendant is in such cases of minor importance. The carriage of the proceedings, so to speak, is thought of moment in the case in 9 Q. B. D., because both actions were of a purely common law character, and it might be expected that a jury would be required by one party or the other. Here that ingredient is wanting, for the present action is one which for all practical purposes is to be regarded as of an essentially equitable character. It is one in which a bill would have been filed, as of course, in Chancery in the days when that was a distinct court, although no doubt it might have been possible to recover in a common law forum. Such, however, would not have been the usual course of litigation. The plaintiffs seek, in substance, to get rid of the effect of progress certificates, under which part payment for the work has been made, as obtained collusively under circumstances of fraud and circumvention by the defendants, to have the actual value of the work done independently ascertained, and to have a repayment of large sums of money alleged to be overpaid. That is the main cause of action, coupled with other matters which are peculiarly cognizable in equity. In principle this is such a case as *Back v. Hay*, L. R. 5 Ch. D. 235, which was to rescind a contract on the ground of fraud and have the money paid by the plaintiff returned. *Malins, V. C.*, refused a jury, saying, at p. 240: "The Court of Chancery had formerly no exclusive jurisdiction in such a case, and under the old practice it might properly have gone before a jury. But questions of fraud have always been considered to be peculiarly within the jurisdiction of the Court of Chancery." He adheres to this same view, as to the proper mode of trial in such cases, in *Ruston v. Tobin*, 10 Ch. D. 558, in which he was affirmed by the Court of Appeal, and with the express approval of Jessel, M. R. (at p. 565.) This is a case also in which, from

its nature, if the plaintiffs succeed in shewing sufficient circumstances of fraud and falsification of results, it may be expected that at some stage it will be referred to a judicial officer to take the accounts. The reasoning in *Gardner v. Jay*, 29 Ch. D. at p. 67, applies to shew that in this respect it is not such a case as ought to be sent to a jury. Difficult and complicated questions of a mixed nature, involving law and fact, may be expected to arise at the trial, which, in my opinion, can be much better dealt with by a Judge than by twelve jurymen: *Gardner v. Jay*, 33 W. R. 470; *Moss v. Bradburn*, 32 W. R. 368; *Smith v. North Staffordshire R. W. Co.*, 44 L. T. 85.

The Master's judgment in striking out the jury notice given by the defendants may therefore be well affirmed, and the affirmation goes a long way to sustain his order in refusing to make this case an appendage of the action in the Queen's Bench Division, though brought by the plaintiffs there in priority to this. I do not regard *Thomson v. S. E. R. W. Co.* as on all fours with this case, because here we have to deal with a cause of action peculiarly of equitable cognizance. If that case did govern the present, I am not prepared to differ with the conclusions of the learned Master.

A large burden of proof, as the pleadings are framed, inevitably rests upon the Railway Company, but it is not clear that any such burden will have to be borne by the contractors, who may succeed in proving all they have to prove in their action out of the mouth of the engineer, Ross.

There is another and later case of *Hyman v. Helm*, 24 Ch. D. 531, which has some bearing upon the two actions now in question. The Hymans sued the defendants in the Chancery Division, as their agents, who had bought goods for them, and by falsifying invoices had made profits out of their principals, and the plaintiffs sought an account of what was really due, and to recover all excess of profits from the defendants. That is very much the same sort of action as the Company is now prosecuting against their contractor. The defendants denied

the agency, and claimed to be acting as principals—set up stated settled accounts, and claimed as yet due to them from the plaintiffs over £2,000. Subsequently the defendants began an independent action for this balance claimed by them in a foreign country, where the Hymans resided. The Hymans moved to stay this action, and failed.

In giving judgment, Chitty, J., said (p. 534): “Indeed, if the defendants in the present action were to commence a cross-action in England a stay could not be obtained, though no doubt there would be that which is practically equivalent to it upon the defendants to that action offering the same terms as they as plaintiffs offer now, viz., to pay the money into Court. On those terms they would get an order for consolidation, but technically they would not get a stay.”

Cotton, L. J., appears to be of much the same opinion, for when the plaintiff in appeal argued that before the Judicature Act the Court of Chancery would have restrained such an action in England, he remarks (p. 535): “You must not take that for granted.”

Brett, M. R., says: “It seems to me that where a party claims this interference of the Court to stop another action between the same parties, it lies upon him to shew to the Court that the multiplicity of actions is vexatious, and that the whole burden of proof lies upon him.”

That is a point which nearly touches the present application. I find no shadow of vexation or impropriety in the action of the railway company seeking to unravel the alleged fraudulent transactions, by which they claim to have paid out to the defendants vast sums of money. They have not set up any claim for the over payments in the contractors’ action, but they have in this Division chosen the proper forum for the investigation of accounts and recovery of over payments.

Why should they be turned over to another and less convenient tribunal at the instance of the contractors, because they happen to be suing at law for the balance of the contract moneys? It may be right to stay the action

of the contractors upon terms till the action of the Company is tried—that trial will determine whether there has been fraud practised upon the Company which will justify a retaking of accounts, and that trial appears to me to be the proper preliminary step in endeavoring to adjust the rights of the parties in this cross-litigation. My conclusion is entirely in accord with the Master's judgment, and I dismiss these appeals, with costs.

Perhaps I have not sufficiently emphasized the point that the independent action of the railway company commends itself to me, because they have not elected to counterclaim for the excess of over payments claimed by them in the action in the Queen's Bench Division. Had they done so the result might have been different, as indicated in *Taylor v. Bradford*, 9 P. R. 350. That, however, is a point which appears to be left undecided in *Hyman v. Helm*. (See judgment of Bowen, L. J., p. 543.)

Appeal dismissed, with costs.

Conmee and McLellan then appealed to a Judge in Chambers in the action in the Queen's Bench Division, from the order of the Master in Chambers staying proceedings in that action.

Osler, Q. C., and Wallace Nesbitt, for the appellants.

Robinson, Q. C., Moss, Q. C., and R. M. Wells, for the respondents.

ROSE, J., following the decision of the Chancellor, dismissed the appeal.

[An appeal to the Court of Appeal from the orders of Boyd, C., and Rose, J., is pending.]

ALEXANDER V. SCHOOL TRUSTEES OF GLOUCESTER

Costs—Taxation—Items of bill.

Upon an appeal from the taxation of the plaintiff's party and party costs. *Held*, (1) A counsel fee for settling plaintiff's reply to defendants' counter-claim should have been taxed.

(2) The costs of a similiter with jury notice were properly disallowed.

(3) Instructions for the examination of the plaintiff, and of the defendants, each \$2.00, should have been taxed.

(4) Attendances to bespeak copies of depositions of parties on their examination for discovery in the action should have been taxed.

(5) The plaintiff was not bound to rely on the admissions of the defendants on their examination for discovery, and therefore the costs of procuring the attendance of a witness to prove what was then admitted should have been taxed.

(6) A fee for attending to hear judgment on a day fixed, when the Judge deferred it till a subsequent day at Toronto should have been taxed.

(7) The discretion of the taxing officer as to counsel fee at the trial should not be interfered with.

(8) Where the Judge directed reasons for judgment in plaintiff's favor to be put in, the plaintiff's charges for drawing, settling, engrossing, &c., such reasons should have been taxed.

(9) A fee for attending to hear judgment at Toronto should have been taxed, although a fee on a previous attendance, when judgment was deferred, had been allowed, and a charge for sending a telegram advising defendants of result of judgment, by direction of Judge, should have been allowed.

(10) Instructions for common affidavit of disbursements was properly disallowed.

(11) Where there is no daily peremptory list of cases at the Assizes, it is necessary to keep the witnesses in attendance from the first day, and the fees for such attendance should have been taxed.

[September 25, 1885.—*Wilson, C. J.*]

THIS was an appeal by the plaintiff from the taxation, by the Deputy Clerk of the Crown at the city of Ottawa, of the plaintiff's costs of the action as against the defendants.

The Deputy Clerk refused to tax to the plaintiff the following items, on the grounds set out:

1. Fee settling reply to counter-claim, on the ground that one fee for revising pleadings was sufficient.

2. Drawing similiter, copy, and service with jury notice, upon the ground that the jury notice might have been served with the reply.

3. Instructions for examination of plaintiff under order to examine obtained by the defendant, upon the ground that it was not taxable against the defendants.

4. Instructions for the examination of the defendants, upon the ground that such instructions were included in the original instructions in the suit.

5. Attending to bespeak copy of depositions of plaintiff after issue joined, upon the ground that the solicitor attending on the examination could have ordered copy when examination completed, without making a special attendance therefor.

6. Attending to bespeak copy of depositions of defendants after issue joined, upon the same ground as last item.

7. Subpœna *duces tecum*, copy, and service on H. V. Noel, and payment of witness fee, upon the ground that H. V. Noel, manager of the Quebec Bank, was called to shew that the defendants had no money in that bank, as alleged in the defence, which two of the trustees in their examination in the cause had admitted to be the case.

8. Fee attending to hear judgment upon day fixed by Judge, when deferred till Judge should return to Toronto, upon the ground that only one fee should be allowed on attending for judgment, and one had been allowed for a previous attendance.

9. A counsel fee of \$100 at the trial. The Deputy Clerk considered \$50 ample.

10. Drafting reasons for judgment in favor of plaintiff, ten fols., \$2, fee settling same, and usual charges for copies, service and filing, upon the ground that the work done and referred to in these items was covered by the counsel fee with brief.

11. Fee attending to hear judgment in Toronto when judgment given in favor of the plaintiff, \$2, upon the ground that only one fee should be allowed for attending to hear judgment, which should cover all attendances.

12. Telegram to defendants' solicitors advising them of result, in accordance with direction of Judge, upon the ground that it was not taxable as between party and party.

13. Instructions for affidavit of disbursements, upon the ground that affidavit was not special.

14. Witness fees to the plaintiff's witnesses for fourteen days. The Deputy Clerk allowed only five days' attendance, as he thought it was unnecessary to have the witnesses in attendance longer than five days.

Holman, in support of the appeal. The counter-claim is the same as a distinct action, and the plaintiff has to revise his defence thereto separately. The similitur was regularly filed in accordance with the practice: see *McLaren v. McCuaig*, 8 P. R. 54; and even though filed for the purpose of delivering a jury notice, should be allowed. Instructions for order to examine are, according to the tariff, 50 cents. Instructions for the examination of the plaintiff is a very reasonable charge. As the plaintiff was to be examined, the plaintiff's solicitor had to be instructed with regard to the case, specially, for the purpose of the examination. A case is often lost or won by the way in which the examination is conducted. It is an important step, within the meaning of the tariff, for which instructions should be allowed. Instructions for examination of the opposite party, \$2, should be allowed for the same reasons. The solicitor has to go into the whole case with his client, and prepare himself fully for the examination. Attending to bespeak copy of the depositions has been disallowed by the deputy clerk, because solicitors attending on the examination could order same without a special attendance. It is no part of counsel's work to order copy of depositions. It is the solicitor's duty, and it matters not whether it involves one step or fifty. The same applies to bespeaking copy of the depositions on defendants' examination. The subpoena *duces tecum* for H. V. Noel was improperly disallowed. The plaintiff was not bound to put in the examination of the defendant at the trial. The fee, attending to hear judgment when deferred, is according to the tariff. The Judge appointed a day to deliver judgment, but was not ready on day named, counsel attended and should be allowed the fee. Counsel fee with brief on trial was improperly reduced from \$100 to \$50. The fee of \$100 should

have been taxed. Drafting reasons for judgment was done at the suggestion of the learned Judge, and, including the fee settling, &c., should be allowed. Fee attending to hear judgment was for a service actually rendered. The telegram was in accordance with the direction of the Judge. Instructions for affidavit of disbursements was properly charged, as there were special clauses as to professional witnesses. The plaintiff subpoenaed the witnesses for the first day of the assizes. There was no peremptory list, and the only proper and safe course was, to have the witnesses in attendance each day till the case was tried, and as soon as the case was tried the witnesses left the assize town.

Allan Cassels, contra. Two fees should not be allowed for settling pleadings. The similiter was served purely for the purpose of delivering a jury notice, and was not necessary. The instructions for orders for examination should include the instructions for examination of plaintiff and defendants. This item of instructions for examinations has never been allowed by the taxing officers. Attending to bespeak copy of the depositions of plaintiff and likewise of defendant should be disallowed. The witness, H. V. Noel, was unnecessary. The examination of defendants, after issue joined, admitted what Noel was called to prove. The counsel fee allowed was ample. Drafting reasons for judgment was a portion of the work of counsel, and should be included in fee with brief. The instructions for affidavit of disbursements should not be allowed. The affidavit was on a printed form.

WILSON, C. J.—A fee of \$2.00 settling reply to counter-claim should be allowed in addition to the fee allowed by the taxing officer on settling statement of claim.

The similiter was properly disallowed.

The instructions for examination of the plaintiff, \$2.00, and instructions for examination of the defendants, \$2.00, should be allowed, as well as attendance to bespeak copy of depositions of plaintiff, 50 cents, and attending to bespeak copy of depositions of defendants, 50 cents.

The plaintiff was not bound to rely on the admission in the examination, he was entitled to subpoena H. V. Noel, and the subpoena and witness fee should be allowed.

Fee attending to hear judgment when judgment deferred was improperly disallowed.

The discretion of the taxing officer as to counsel fee should not be interfered with in this case.

The charges with reference to drafting reasons for judgment should have been taxed, the work being done in accordance with the direction of the Judge.

The fee attending to hear judgment, \$2.00, should be allowed, as well as the telegram.

No instructions should be allowed for the affidavit of disbursements, as it was an ordinary affidavit.

It was necessary in this case to keep the witnesses in attendance from the first day of the Assizes, and the fees should be allowed.

Order accordingly, without costs.

COCHRANE MANUFACTURING COMPANY v. LAMON.

Capias—Judgment—Special bail—Appearance—Statement of claim—C. L. P. Act, sec. 34, (R. S. O. ch. 50, sec. 39)—O. J. A., rule 5.

The plaintiffs issued a writ of capias, irregular and contradictory in its provisions. It purported to be issued in a pending action in which judgment had been recovered, and claimed the amount of the judgment and further costs. It required the defendant to put in special bail, which by its recognizance meant an undertaking by sureties to pay the condemnation money, in which the defendant "shall be condemned in this action." The claim indorsed upon the writ and the requirement as to special bail were alone applicable to a pending action on the judgment. The bail to the sheriff undertook that special bail would be put in, and special bail was put in.

Held, that the defendant and his sureties had, by putting in special bail, treated the writ as one issued in an action on the judgment, and had placed the defendant in the same position as if he had appeared in such action, and a statement of claim delivered after such an appearance was therefore regular.

Semble, section 34 of the C. L. P. Act, (R. S. O. ch. 50, sec. 39) has not been repealed by rule 5, O. J. A.

[July 8, 1885.—*Rose, J.*]

[December 2, 1885.—*The Queen's Bench Division.*]

THIS was an appeal by the plaintiffs from an order of the Local Judge of the High Court at London, setting aside the statement of claim filed herein.

Aylesworth, for the appeal.

Shepley, contra.

ROSE, J.—In order to understand the position of the parties on this, so far the last of several applications herein which have come before me, I think it best to state to such extent as may be necessary the history of the action.

The plaintiffs obtained judgment against the defendant in an action, in the same style of cause and in the same Division (Queen's Bench), for \$5,154, and \$51.31 costs of suit. The date of recovery was the 17th of April, 1884.

On the 5th November, 1884, an order was obtained by the plaintiffs from the Local Judge allowing the issue of one or more writs of capias "in this cause." The style of cause was the same as above described, and as appears herein.

The writ issued was peculiar in form. The sheriff was commanded to take the defendant and keep him, "until he shall have given you bail in the action, which the Cochrane Manufacturing Company (Limited) have commenced against him, and in which action they have recovered judgment against him."

The defendant was required within ten days after execution to cause to be put in "special bail" according to the warning thereunder written, failing which proceedings would be taken according to the warning.

The *nota bene*, "The defendant may appear hereto by entering appearance hereto," &c., was struck out; as also warning No. 1, warning him that if he should go to prison for want of bail, the plaintiff might declare and proceed to judgment and execution. Also warning No. 3 to the effect that if the defendant be not arrested upon though served with the writ, and does not enter an appearance, the plaintiff is to be at liberty to proceed to judgment and execution.

Warning No. 2 remained, which informed the defendant that if, having given bail to the sheriff, he omitted to put in special bail, the plaintiff might proceed against the sheriff or on the bail bond.

The indorsement of claim was for "\$5,111 and interest from judgment," &c., with the notice that if paid within eight days further proceedings would be stayed.

It is argued that from the form of the writ it is difficult to say whether it was intended for a *capias* before action, *capias* after action, or for a *ca. sa.* Possibly there was not a clear apprehension of the practice in the mind of the person who prepared it.

The defendant was taken, and bail given to the sheriff. I have not a copy of the bond among the papers.

On the 6th of December an application was made to me for a stay of proceedings against the sureties, pending an application to set aside the writ, &c., which I granted. †

I have not the papers on that application before me, but looking at my note-book I find that on the 9th of Decem-

ber a motion was made before me for an order setting aside the writ.

The plaintiffs asked for an enlargement to examine the defendant, who had returned to the State of Michigan. To this the defendant's counsel objected, his client fearing to come into the jurisdiction, as he suggested some one else might arrest him. I directed an enlargement, and that the defendant attend at London on being paid conduct money.

The defendant having refused to obey my order, I, on the 19th of December, heard counsel as to why the application should not be dismissed, and no cause having been shewn such as was deemed satisfactory, the application was dismissed, with costs.

That order was re-heard before the full Court, and upheld.

On the 17th of February, 1885, special bail was put in. The bail piece was in the usual form, save that by order of the Judge it was entered into by three instead of two, and these justified in different amounts.

It states that the defendant is delivered to bail upon a *cepi corpus* to his sureties at the suit of these plaintiffs.

In the margin are the names of the solicitors in whose names the bail was put in as follows: "Meredith & Scatcherd, of the City of London in the County of Middlesex, solicitors for the defendant."

The recognizance was in the usual form, being an undertaking that if the defendant "shall be condemned in this action at the suit of the Cochrane Manufacturing Company (Limited) he will satisfy the costs and condemnation money, or render himself to the custody of the sheriff of the county of Middlesex, or [they] will do it for him."

There has been a struggle over the allowance of this bail, the proceedings as to which ended temporarily at least in an order for its allowance.

The disposition of that question I have set out in a judgment, which I deliver contemporaneously with this, but, as affecting the proceedings, it may be stated that the order of allowance was made on the 16th of May, but was not to be issued until I could consider the question of costs.

On the 28th of May the plaintiffs delivered a statement of claim. On its face appears, "Writ issued 20th February, 1884. Writ of *capias* issued November 5th, 1884."

It sets out; judgment recovered, that it remains wholly unsatisfied, and claims payment of the amount.

On the 30th of May a summons was taken out to set aside the statement of claim and service on the following grounds.

1. That it was filed before the action had been commenced by a writ of summons.

2. There was no authority to serve it on the firm of Meredith & Scatcherd.

3. That if valid the writ is a writ of *capias ad satisfaciendum*, and the arrest of the defendant is an extinguishment of the judgment.

4. That if the writ be a *ca. re.* it was not the proper one to issue on the Judge's order.

5. That the statement of claim was filed after the expiry of three months from the entry of appearance, and no order was made for extending the time for delivery of same.

6. There was no authority or power to sue upon the judgment.

I do not find, and should not expect to find, any case in point, and must therefore endeavor to make such an order as will, if possible, effectuate the object of the proceedings, if I can with reasonable clearness discover such object.

I think I cannot go behind the writ after the proceedings to set it aside have failed, as I have above set out, but must take it as a good and valid writ, for whatever purpose it may be valid.

I think I may fairly assume that the bond given to the sheriff was in accordance with the warning, and in ordinary form, with a condition requiring special bail to be put in.

The order of the learned Judge allowing the issue of the writ was in the usual form, and would authorize the issue of a writ of *capias* before action, if it were proper to issue such a writ.

It is clear an action may be brought on a judgment—the only question is that of costs of the proceedings.

If, therefore, the plaintiffs had issued an ordinary writ of summons on the judgment, and then applied for a writ of *capias*, it would have been regular to have granted the order.

The defendant and the sureties have so treated it, as they entered into an undertaking by the special bail piece to pay the amount of condemnation money which shall be in this action.

This language would be insensible if there were no action in progress—if the writ were a *cá. sa.*

I do not quite see how the entry on the bail piece of the solicitors' names can be treated as an appearance. An appearance was not necessary under the C. L. P. Act. See sec. 34 (R. S. O. ch. 50, sec. 39): "Special bail may be put in and perfected according to the established practice, and after special bail has been put in the plaintiff may, by filing a declaration or otherwise, proceed to judgment in like manner, as if the action had been commenced by writ of summons and the defendant had appeared thereto"

I understand that to mean that the writ of *capias* shall stand in lieu of the writ of summons, and the putting in of special bail as an appearance thereto.

The entry on the bail piece of the solicitors' names was not treated as an appearance in *Marden's Bail*, 3 Dowl. P. C. 654.

Unless, as was argued though not decided in *Vetter v. Cowan*, 46 U. C. R. 435, 438, the provisions of the C. L. P. Act relating to the writ of *capias* have been abrogated by rule 5, O. J. A., there could be but little room for argument in this case, save from the peculiar wording of the writ itself.

In view of the many difficulties in the way of holding that the provisions of the C. L. P. Act are not in force, I do not think it wise so to hold, unless I am forced to such a conclusion. There are no provisions substituted, and it may be it is a case which should be dealt with by a rule of Court.

There being no decision to the contrary, and the learned Chief Justice having, in *Vetter v. Cowan*, held that a writ of *capias* may be issued before the issue of a writ of summons, and section 34 of the C. L. P. Act not having, as I think, been repealed, I see no reason why the putting in of the special bail should not be considered as the appearance to the action, and the statement of claim regularly delivered.

If I thought the writ a writ before action, and it necessary to have a writ of summons issued, I should allow a writ of summons to be issued and served, and statement of claim filed and delivered, and time to be reckoned in vacation, so that judgment might be obtained at the London Sittings on the 15th of September next.

I would do this, as the effort made to get rid of the liability of the special bail is an effort to do what the defendant put it out of his power to do, namely, get rid of the arrest.

There is not the slightest merit in the application. It is an effort to free the defendant from a liability which he has been declared by the judgment of the Court to be under, and must meet with no assistance.

If the plaintiffs would feel more secure in adopting the proceedings I have indicated, they may have the order as suggested, and this appeal will be dismissed without costs, and the order made in such terms.

I am not forgetting the form of the writ, but it could have been amended on the application to set it aside, (see *Robertson v. Coulton*, 9 P. R. 16), and possibly might yet be amended without prejudice to the subsequent proceedings. It has answered its purpose of arresting the defendant and holding him to special bail.

I have thus disposed of objections Nos. 1 and 4, and incidentally of No. 2.

I think No. 3 clearly not tenable. See *Hamilton v. Holcomb*, 11 C. P. 93, 2 E. & A. 230.

No. 5 is not grounded in fact. The order of allowance as made on the appeal was of the 16th of May, as I have stated, and the statement was delivered on the 28th.

No. 6 is clearly not sustainable. Under 43 Geo. III. ch. 46, sec. 4, a plaintiff would not be entitled to costs unless otherwise ordered, (see *Archbold's Q. B. Pr.* 12 ed., p. 494), but an action on a judgment is a well recognized proceeding.

The result seems to me to be as follows :

The plaintiffs issued a writ of *capias* irregular and contradictory in its provisions. It purported to be issued in a pending action in which judgment had been recovered, and claimed the amount of the judgment and further costs.

It required the defendant to put in special bail, which by its recognizance meant an undertaking by sureties to pay the condemnation money, in which the defendant "shall be condemned in this action."

The claim indorsed upon the writ and the requirement as to special bail were alone applicable to a pending action on the judgment.

The bail to the sheriff undertook that special bail would be put in, and special bail was put in.

Thus the defendant and his sureties have, I think, treated the writ as one issued in an action on the judgment, and having put in special bail the defendant is, I think, in the same position as if he had appeared in an action on the judgment.

The statement of claim standing, and judgment being obtained without costs, the defendant and his sureties will be in the position they undertook to be when special bail was given.

I think this appeal must be allowed, with costs in the cause to the plaintiffs in any event.

As I have been compelled to delay the giving of judgment until vacation, the time for pleading must be reckoned in vacation. (See Rules 460, 461, O. J. A.)

December 2nd, 1885, *Shepley* appealed to the Queen's Bench Divisional Court from the foregoing decision.

Aylesworth, contra, was not called upon.

Appeal dismissed, with costs.

SMITH ET AL. V. GREY ET AL.

Patent suit—Particulars—35 Vic. ch. 26, sec. 24 (D.)

In an action for infringement of a patent the defendants denied (4) the novelty of the invention, and (6) that the plaintiff was the first and true inventor.

Held [BOYD, C., dissenting], that the defendants should deliver particulars under these defences, shewing in what respects the defendants deny that the plaintiffs' patent was for any new machine, &c., and the dates and occasions when, and also the names of the persons by whom the prior user was had.

Per BOYD, C.—In the absence of any legislation or rules of Court upon the subject, the Judge has no power or right to prescribe so minutely what shall be disclosed in the particulars. The statute 35 Vic. ch. 26, sec. 24 (D.) goes no further than to justify such general order for particulars as is usual in other cases.

Mills v. Scott, 5 U. C. R. 360, discussed.

[December 3, 1885.—*The Chancery Division.*]

THIS was an appeal by the defendants from an order of Proudfoot, J., in Chambers, directing them to deliver further particulars under their defence.

The material facts appear from the judgments.

F. R. Powell, for the appeal.

Mervyn Mackenzie, contra.

BOYD, C.—In this action for infringement of patent the defendants among other defences deny (4) the novelty of the invention, and also deny (6) that the plaintiff was the first and true inventor.

An order was made by me on the 17th October, 1884, (on appeal from the Master) requiring the defendants to give particulars of the latter defence. I was of opinion, overruling the Master, that there might be a twofold line of evidence admissible under this apparently simple denial, going to establish, on one hand that the patentee had borrowed the idea of others, and was not entitled to any credit for originality of design (*i. e.*, that he was not the actual inventor), and on the other hand that although the plaintiff had really designed the thing patented without reference to others, yet the subject-matter of the invention was not

a novelty, (*i. e.*, that he was not the first inventor). The particulars furnished as to this defence disclosed that the line of attack was that of prior user and invention, and it is therein stated that the defendants will give evidence of the prior use of the invention in Canada, England, and the United States, and other countries, and that the defendants will shew anticipation by other inventors in England and the United States and other countries, according to various patents, of which thirty-eight are there specified.

An application was then made to the Master in Chambers for particulars under the defence denying novelty and also for further and better particulars under the other defence. The Master held the particulars already given to be sufficient, and ordered particulars of the want of novelty as asked.

The defendants thereupon delivered particulars under the fourth defence, that of no novelty, by stating that they would shew, in view of the state of the art, that no patent should have issued: that the invention was not for any new machine, &c., within the meaning of the Patent Act: that the extent of plaintiffs' invention was mere substitution of a travelling brush for a brush used by hand in the operation of a middlings purifier; that the matter of this defence was also a matter of law upon the construction of the patent and specifications; and that the mechanical effect of plaintiffs' combination was not correctly stated; and that its real effect is one covered by other contrivances and patents of inventions.

From the last mentioned order of the Master the plaintiffs appealed to Proudfoot, J., who varied it by ordering the defendants to deliver under the fourth and sixth defences particulars stating in what respects the defendants deny that the plaintiffs' patent was for any new machine, &c., and the dates and occasions when, and the places where, the prior user of the said invention or any material part thereof took place, and the names of the persons by whom the prior user was had. From this order an appeal is taken to the Divisional Court.

Apart from any special legislation as to procedure in actions relating to patents for inventions, the Court has general jurisdiction to control and regulate the proceedings, in order to prevent surprise and misadventure: *Electric Telegraph Co. v. Nott*, 4 C. B. 462. As it regards particulars of breaches or objections the practice which prevails in other cases should govern, in the absence of such legislation as has taken place in England. My own desire would be to have the fullest possible discovery of the matters which are to be discussed at the trial, because of the usually lengthy and complicated character of the investigations in patent cases, but I doubt the power or right of the Judge to prescribe so minutely what shall be disclosed in the particulars as was done in the order now in appeal, in the absence of any legislation or rules of Court to warrant such a course. I endeavored to point out this distinction between our practice and the English, in *Smith v. Greely*, 10 P. R. 482. I find that attention is called to the difference of practice in England before and after patent legislation in Mr. Bray's very useful book on Discovery pp. 550-553. The first English Act, 5 & 6 Wm. IV. ch. 83, sec. 5, requires the defendant in pleading to give the plaintiff a notice of any objections on which he meant to rely at the trial. Upon this it was held in the latest reported decision in 1843, *Russell v. Ledsam*, 11 M. & W. 647, that the notice of objections need not state (upon defences such as are in question here) who the first inventor was, or under what circumstances the invention had been previously used. Such was also the practice in the other Courts, as appears by *Reg. v. Walton*, 2 Q. B. 969. See also *Daw v. Eley*, 2 H. & M. 725; *Bovill v. Smith*, L. R. 2 Eq. 459; and *Parnell v. Mort*, 29 Ch. D. 325, 327.

The inconvenience arising from this state of the practice was no doubt the occasion of passing the Act of 1852, (15 & 16 Vic. ch. 83, sec. 41) which requires particulars to be given of the place or places at or in which, and in what manner the invention is alleged to have been used or published prior to the patent. And by the Act of 1883,

the time and place of prior user are to be given. The order for further and better particulars under these statutes as settled by the Court of Appeal in *Flower v. Lloyd*, 45 L. J. N. S. Ch. 746, and given in *Seton*, p. 349, shews as a matter of form that the order now in appeal, goes far beyond what is ordered in England. But this matter of practice in this country was determined at an early day by the Court of Queen's Bench, in *Mills v. Scott*, 5 U. C. R. 360, in which it was held that if the plaintiff demanded particulars as to who had made prior use of the alleged invention, and when and where, that was information which the defendant was not bound to give him. There has been no legislation warranting any change of the practice in this regard at law, and it is quite a recent innovation to apply for particulars in equity. The substitute there was to examine the defendant.

My brother Ferguson relies upon the statute 35 Vic. ch. 26, sec. 24, (D.) which empowers the Judge to make an order for inspection and account, and "respecting the same and the proceedings in the action," as authorizing the order now in appeal. In my opinion that goes no farther than to justify such general order for particulars as is usual in other cases. It is no more than an affirmance of the inherent powers possessed by the Court, which was recognized in *Electric Telegraphic Co. v. Nott*, 4 C. B. 462; and though I am not able to justify from its language such minute and comprehensive discovery by way of particulars as was here ordered, I am well satisfied that the practice should be as determined by the judgments of my learned brethren.

The case was not argued before us on any suggestion that the particulars furnished under the fourth defence were not applicable to that line of defence, and I have not deemed it necessary to consider that point.

Speaking generally, I think the information supplied under both heads to be practically sufficient to notify the plaintiffs of the nature of the contest raised by the defendants, and that being so, my opinion is, that the order

requiring further details is not warranted by the practice in this country, and that it should be discharged with costs in any event to the defendants in the cause.

FERGUSON, J.—This was an appeal from, or rehearing of an order made by Mr. Justice Proudfoot upon an appeal from an order made by the Master in Chambers.

The action is for alleged infringements of a patent of invention. The order is in respect to particulars to be delivered by the defendants to the plaintiffs, and it directs that the defendants deliver to the plaintiffs in writing under the fourth and sixth paragraphs of the statement of defence particulars, stating in what respects the defendants deny that the patented invention called and known as "Smith's Flour Dressing Machine," under patent number 2257, in the statement of claim mentioned, was for the invention of any new machine, manufacture, or composition of matter, and the dates and occasions when, and the places where, the prior user of the said invention or any material part thereof, upon which the defendants rely, took place, and the names of the persons by whom the defendants claim the prior user as aforesaid was had. The order affirmed the order of the Master in Chambers as to the eleventh paragraph of the statement of defence. There was not, however, as I understood the argument, any contention as to this part of the order.

The case *Mills v. Scott*, 5 U. C. R. 360, was for an alleged infringement of a patent. One of the pleas was, that the invention was not new, but had been wholly, and in part practised, used, and vended in Great Britain, &c., before the grant of the patent. An order had been made in Chambers that the defendant should deliver to the plaintiff particulars of any objections on which he had intended to rely in support of his plea, and a notice delivered by the defendant to the plaintiff that he intended to object at the trial to the patent altogether, as being granted for what was not a new invention, was held to be sufficiently particular, and a compliance with the order. The

concluding paragraph of the judgment is as follows: "If the plaintiff is not satisfied with this, and demands to know who has used it, and when and where, then it is open to him to apply for that statement; in answer to which he should, I think, be told that this is information which the defendant is not bound to give him." The judgment of the Court was delivered by the then Chief Justice.

That decision was while 7 Geo. IV. ch. 5 was in force, which it was remarked did not contain any provisions such as that in the Imperial Act, 5 & 6 Wm. IV. ch. 83, and the orders, it was said, were made under the general practice of the court.

The section of the Act in which one would expect to find such a provision is section 5, which provides that any person infringing, &c., shall be liable to an action, in which, besides such damages as shall be awarded by a jury, the parties injured shall recover treble costs. The sixth section of that Act, which treats of certain defences, is also silent as to any such notice as is mentioned in the Imperial Act above referred to.

Since the date of that decision there does not appear to have been any legislation in this country regarding particulars in suits for the alleged infringements of patents, as there has been in England. The 24th section of the Act of 1872, however, contains this provision. "In any action for the infringement of a patent, the Court if sitting, or any Judge thereof in Chambers, if the Court be not sitting, may on the application of the plaintiff or defendant respectively, make such order for an injunction, restraining the opposite party from further use, manufacture, or sale of the subject matter of the patent, and for his punishment in the event of disobedience to such order, or for inspection or account, and respecting the same and the proceedings in the action, as the Court or Judge may see fit." So far as I have perceived this provision first appears in the Act of 1869.

This provision seems to me to give the Court or Judge general power to make such order as may seem fit respec-

ting the proceedings in the action, and I see no reason to doubt that the delivery of particulars is a proceeding. In *The London, Brighton, &c., R. W. Co. v. The London, Chatham, &c., R. W. Co.*, L. R. 3 Q. B. 170, the taxation of costs was held to be a "proceeding" within the meaning of the word as used in the section of the Act there in question.

If under the ordinary practice there is not jurisdiction to make an order for particulars in a suit for the infringement of a patent, I think the power is given by the provision in the Patent Act of 1872, to which I have referred.

Then if there was jurisdiction to make the order, the next question is: Is the order made and appealed from proper and reasonable? On this question the enactments, and practice under them, in England would, I think, constitute a safe guide, and although the decisions do not appear to be uniform, I think, after looking at a number of them, that they do not shew that the order under review should be the subject of complaint.

In *Palmer v. Cooper*, 9 Ex. 231, (under the Act of 1852) Baron Alderson required the names and present addresses of the persons who had used, or were said to have used, the invention, to be given, as otherwise the plaintiff would not know where to go for his evidence. In *Fisher v. Dewick*, 4 Bing. N. C. 706, 1 Web. P. C. 267, Tindal, C. J., said: "The object of particulars is not to limit the defences, but to limit the expense to the parties, and more particularly to prevent the patentee from being upset by some unexpected turn of the evidence." In *Palmer v. Cooper*, Baron Parke said, 9 Ex. p. 236: "The defendant's particulars ought to give the plaintiff such information as will enable him to make the necessary inquiries at the places named."

One of the chief objections to the order at the argument of this case was, that the giving of the names as required by the order would be giving names of witnesses for the defence, but I do not see that this is necessarily so. It might be the case in some instances and not in others.

No doubt, there are cases in which the names and addresses have been refused. In *Terrell's Law of Patents*,

page 204, the author says: "It is obvious that, although it is a recognized principle that one litigant shall not be permitted to inquire as to what witnesses the other is about to call at the trial, still that by far the more important principle is, that neither party should be taken by surprise, and that the plaintiff should have a fair opportunity of critically examining every alleged anticipation which may be attempted to be established against him." And he submits that, on the whole, the "names and addresses of such persons should be given in particulars of objections." I am of the opinion that the order which is the subject of this appeal is not too comprehensive in its terms, and that there was jurisdiction to make it. I think it should be affirmed, and that the appeal should be dismissed, with costs.

PROUDFOOT, J., was not present.

Order affirmed, with costs.

PEEL V. WHITE.

Limited defence—Appearance—Statement of claim—Rule 68, O. J. A.

In an action for foreclosure the defendant entered an appearance under Rule 68, O. J. A., limiting his defence to one item in the particulars indorsed on the writ of summons. The appearance did not state that the defendant did not require the delivery of a statement of claim.

Held, that after such appearance a statement of claim was unnecessary, and a judgment signed upon it, for default of a statement of defence, was set aside, with costs.

[October 12, 1885.—*The Master-in-Chambers.*]

THIS was a motion to set aside a judgment signed for default of a statement of defence.

The facts appear in the judgment.

Hoyles, for the defendant.

McPhillips, for the plaintiff.

THE MASTER-IN-CHAMBERS.—This is a suit for foreclosure ; the mortgage shown on the statement of claim, calls for principal and interest, and the claim includes a demand for \$177.56, back taxes, which the mortgagee claims from the defendant.

The writ issued and the appearance was entered by the defendant in December last. It runs :

“Enter an appearance for the defendant in this action. The said defendant limits his defence to the item, taxes paid, \$177.56, mentioned in the writ of summons herein.”

This was entered under Rule 68, which is in these words :

“Any person appearing to a writ of summons in other cases may limit his defence to the question of the amount to which the plaintiff is entitled, and in that case may in his appearance, or by notice served within four days thereafter, state that he disputes only the amount claimed by the plaintiff ; and he need not file any further defence for the purpose of disputing such amount ; and the plaintiff is to proceed as if the defendant had filed a defence disputing

the amount of the claim. The notice disputing the amount of the claim may be in the form No. 15 in Appendix (B) hereto, with such variations as circumstances may require."

Though not perhaps exactly accurate, I think that the above note in the appearance sufficiently brings the defendant's case under the Rule, and substantially shews enough. That is, that the defendant admits all the plaintiff's case except the one item of back taxes, and that that item he disputes. That seems to me substantially right enough under the Rule—for the memorandum will bear that meaning, and I do not think it will bear any other.

The writ shows here just what the statement of claim shows, and the plaintiff according to the Rule in case of such an appearance, "is to proceed as if the defendant had filed a defence disputing the amount of the claim." The plaintiff, however, filed and tendered to the defendant a statement of claim some months ago, which the defendant refused to accept; and the defendant swears that it was only quite lately he became aware that some time ago the plaintiff had signed judgment against him.

Whatever doubt there may be as to the manner of proceeding under the Rule in other cases,—and I do not think there is any real difficulty any where—it is plain what must be done in a mortgage case, which this is.

It is true that the defendant has given no notice dispensing with a statement of claim under Rules 56 and 158. But what then? There is no inconsistency in giving effect to Rule 68, for simply, the case has never arrived at that stage where a statement of claim was proper, for the defendant's action under Rule 68 has superseded the necessity for the statement of claim, and has pointed out to the plaintiff another way of proceeding.

Each party well knows from the writ and appearance exactly what the other means. Then, how could the case be made clearer by a statement of claim and defence.

The Rule is quite clear. The intention of it is to eliminate from the practice unnecessary proceedings,

I must set aside the judgment, with costs.

McCALLUM v. McCALLUM.

Costs—Taxation—Local Registrar—Certificate—Notice of appeal—Counsel fees—Instructions.

Where no formal certificate of the result of a taxation by a local registrar of the party and party costs was filed, but the bill itself, with a memorandum at the end signed by the registrar shewing the result, was filed in the local office and forwarded to Toronto for the purposes of an appeal, and it was admitted that execution had issued upon such memorandum.

Held, that the appeal should not be barred because no more formal certificate was filed.

Two clear days' notice of such an appeal is sufficient: *Exchange Bank v. Newell*, 19 C. L. J. 253, distinguished.

A counsel fee of \$5 for each necessary and proper enlargement of a Court motion should be taxed.

Instructions for brief should be allowed, where the brief itself is allowed.

[November 30, 1885.—*Boyd, C.*]

AN appeal by the plaintiff from the taxation by the local Registrar at St. Thomas of his costs of the action between party and party upon two grounds, viz.: (1.) That the counsel fees upon four enlargements of an injunction motion should have been allowed at \$5 each, instead of \$1 each allowed by the Registrar. (2.) That the item "instructions for brief at trial," should have been allowed, the brief itself having been allowed.

Holman, for the appeal.

Douglas Armour, contra, took two preliminary objections: (1.) That the certificate of the Registrar's taxation was not filed, citing *Langtry v. Dumoulin*, 10 P. R. 444. (2.) That there should have been seven days' notice of appeal, instead of only two, citing *Exchange Bank v. Newell*, 19 C. L. J. 253.

The papers forwarded to Toronto for the purposes of appeal included the bill of costs, which was filed in the office of the local Registrar, having at the end a memorandum of the result of the taxation, signed by the local Registrar, and it was admitted that execution had issued upon this memorandum.

Boyd, C.—There having been a conclusion of the taxation, a signing, on the bill of costs filed, of a memorandum shewing the result, and the issue of execution thereon, I cannot give effect to the objection that no certificate has been filed.

As to the second objection, the taxation in *Exchange Bank v. Newell*, 19 C. L. J. 253, was one between solicitor and client, in which the taxing officer exercised the functions of a Master upon a reference, and his certificate upon such taxation would be equivalent to a Master's report, and would come under G. O. Chy. 642, requiring seven days' notice of appeal. The officer here was not acting as Master, but as Registrar. A more speedy remedy ought to be provided in such cases, and I think the common law practice of reviewing such taxations upon a two days' notice is the more beneficial one, and ought to be followed. The appeal will be allowed upon both points taken.

The counsel fees upon the enlargements of the injunction motion ought to be at the rate of \$5 each, as they seem to have been proper enlargements. The instructions for brief should be allowed, as the brief itself was allowed.

Appeal allowed, with costs fixed at \$10.

MC'ELHERAN V. THE LONDON MASONIC MUTUAL BENEFIT ASSOCIATION.

Adverse claims—Right to interplead—Summary application—Chancery practice—Sec. 17, sub-sec. 6 and rule 2, O. J. A.—Payment into Court—Costs—Indemnity—Staying action.

The plaintiff, J. P., and one E. T. severally claimed from the defendants payment of the moneys due under a certain certificate of membership issued by the defendants to T. P., deceased, the plaintiff claiming as administrator *pendente lite* of T. P., J. P. claiming that the certificate had been indorsed to her by the deceased, and E. T. as administrator. It appeared that a duplicate certificate had issued to T. P. upon his alleging that he had lost the one originally issued. The defendants were always willing to pay any one who might be entitled, and upon this action being brought applied for an interpleader order in respect of the adverse claims. J. P. did not appear in answer to the application, and her claim was barred, and the money ordered to be paid to E. T. upon certain terms. Upon an appeal by E. T. from this order it was

Held, that there was a right to interpleader upon a summary application, either under sec. 17, sub-sec. 6, O. J. A., or under the former practice of the Court of Chancery. Rule 2, O. J. A., does not extinguish any right to interplead that formerly existed; it regulates the practice only, and enables a defendant to obtain relief upon a summary application, where formerly it would have been necessary to file a bill.

Held, also, that the defendants were entitled to their costs of the action and application, and to retain them out of the funds in their hands, and that the balance should be paid to E. T. instead of into Court, as the other claimant had withdrawn, upon E. T. indemnifying the defendants against the production of the original certificate, and that the action should be stayed.

[December 1, 1885.—*Proudfoot, J.*]

THOMAS PEEL was a member of the defendant association, and received a certificate under seal to that effect, and which stated that "in the event of disability the amount held in trust will be paid to said brother (Peel), and at his demise to the person or persons named in the form of application for membership, or to the person or persons named on the back of the certificate."

The indorsement on the back of such certificate was a short form of a will, to be filled up by the member.

Peel applied for a duplicate certificate, as he said he had lost the former one, and it was issued to him.

Peel died intestate. Some litigation took place in regard to a grant of administration, and the plaintiff was appointed administrator *pendente lite*.

Jessie Peel, claiming to be the widow of Thomas Peel, notified the defendants that the certificate of membership had been indorsed to her, and claimed payment of the money payable under the certificate, but was unable to produce it, alleging, however, that she was in a position to prove that the certificate was properly indorsed.

The administrator also notified the defendants not to pay to any one but himself.

The defendants were always ready to pay to any one who might be entitled.

At length the administrator *pendente lite* brought this action against the defendants, subsequent to which one E. Towe was appointed administrator, and the action was continued on his behalf. The defendants applied to Mr. Winchester, an Official Referee sitting for the Master in Chambers, who made an order staying all proceedings in the action, and barring the claim of Jessie Peel, no one appearing to support it, and ordering the defendants to pay to E. Towe the money due under the certificate, after he should have furnished to the defendants sufficient evidence of his being duly appointed administrator, and should have furnished to the defendants security, to the satisfaction of the local Master at London, indemnifying the defendants against loss, damages, costs, and charges, which they might incur or be put to by reason of any lawful claim which might thereafter be made against them upon or in respect of the said certificate or duplicate, or should have delivered up the said certificate and duplicate to the defendants to be cancelled; the defendants first retaining out of the said money their costs of the action and of that application, and of the giving of the indemnity.

It was stated on the argument that the direction to pay to Towe instead of into court was made at the instance of Towe.

Towe now appealed from this order because :

1. The matter in question was not the subject of an interpleader application.

2. The claimant having abandoned, no order should have been made as to the money in question in the action.

3. That no costs of the action or of the interpleader application should have been awarded to the defendants.

4. That the proceedings in the action should not have been stayed.

5. That Towe should not have been ordered to indemnify the defendants.

Shepley, for the appeal.

A. H. Marsh, contra.

PROUDFOOT, J.—There appears to be some doubt whether since the Judicature Act the old Chancery practice in interpleader still survives. The recent editors of *Daniell's* Chancery forms, and *Seton* on Decrees, think that it does, while Mr. Pemberton and Mr. Cababè are apparently of a different opinion. See *Cababè* on Interpleader, p. 4, note. Marginal rule 2 of the Judicature Act provides that the procedure and practice now used by courts of common law under the Interpleader Act shall apply to all actions and to all the Divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons, and before delivering a defence.

It was argued that the right to interplead was limited to cases coming within the Interpleader Act, viz., assumpsit, debt, detinue, or trover, and that the cause of action here, not being any of those, there was no right to interplead. But that marginal rule was not intended to extinguish any right to interplead that previously existed, it regulated the practice only.

The Court of Chancery always had jurisdiction in interpleader, though the mode of obtaining relief was only by filing a bill for that purpose. This marginal rule enables a defendant to obtain relief on a summary application instead of filing a bill.

But sec. 17, sub-sec. 6 of the Judicature Act (*MacLennan*, 2nd ed., 25) contains a provision that covers the present case. It enacts, that in case of an assignment of a debt or other chose in action, if the debtor, trustee, or other person liable in respect of the debt or chose in action, shall have had notice that the assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to the debt, &c., he shall be entitled to call upon the claimants to interplead, or may pay the same into court under the Trustee Act. In the present case Jessie Peel alleged that the debt or chose in action had been assigned to her, and the representatives of Thomas Peel disputed the assignment.

In any view, therefore, I think there was a right to interplead.

To entitle a debtor or trustee to interplead he must be prepared to pay the money, whether the claimant abandoned or not, and the usual order would have been to pay into court. At the instance of the present appellant the order was made for payment to him, and he cannot be permitted to complain of it.

Mr. Cababè (p. 69) states the rule as to costs in such actions in this way: "Remembering then that there are the costs of three parties to be dealt with, viz., those of the defendant interpleading, of the plaintiff, and of the claimant, the first general rule is that if the defendant *bond fide* applies for relief, and his position is that of an innocent stakeholder, he will get his costs; and these will be a first charge upon the fund or subject matter in dispute." And on p. 70, he says: "In the event of the claimant not appearing, the rule is, that the defendant and the plaintiff each pay their own costs, and the fund or subject matter in dispute is handed over to the plaintiff. This rule certainly does seem to involve the illogical result that it depends on the act of a third party (his own conduct being the same), whether the defendant gets his costs or not," and the defendant would have to pay the costs of the action against him so far as it had proceeded. The cases cited in support

of this illogical doctrine are *Lambert v. Cooper*, 5 Dowl. 547, and *Murdoch v. Taylor*, 6 Bing. N. C. 293, both cases at common law and prior to the Judicature Act.

But the rules in Equity in regard to interpleader costs were not the same as at law : *Seton*, 4th ed.. 367. Plaintiff, if in the right, is entitled to his costs, and out of the fund in Court if any : *Glynn v. Locke*, 3 Dr. & War. 11, 24. And defendant, when in the position of an interpleading plaintiff, may retain his costs out of the debt : *Aplin v. Cates*, 30 L. J. Ch. 6. And I think that, in this respect, we need not be driven to follow an illogical practice, as the present claim does not seem to be one under the Interpleader Act, but depending on equitable principles. I think the order right in giving the defendants their costs, and allowing them to retain them out of the money in their hands. See also *Campbell v. Solomons*, 1 S. & S. 462 ; *Cowtan v. Williams*, 9 Ves. 107 ; *Hodges v. Smith*, 1 Cox 357.

When the plaintiff gets paid the money for which the action is brought, I cannot imagine any reason why the action should not be stayed. In directing an issue, the order would stay the proceedings : *Seton*, 358 ; and if no issue is required, but the plaintiff's right admitted and the money paid, it would follow as a matter of course that the action should be stayed.

The last objection to the order is, that Towe should not have been ordered to give an indemnity. The lost instruments (for both appear to have been lost) were not negotiable, and the indemnity was not ordered in that respect in the C. L. P. A., but under an equitable jurisdiction inherent, since the Judicature Act, in all the Divisions of the High Court, and the plaintiff, before he can get payment, is bound to give an indemnity. His refusing to give an indemnity is an additional reason for giving the defendants their costs. And although this certificate is not negotiable, in the sense that a bill of exchange or promissory note is negotiable, it is capable of assignment or transfer, as a chose in action, under R. S. O. ch. 116, secs.

6-12; and a bequest of it by will, in the form indorsed, would be an assignment under section 6, and the beneficial interest in it might be charged or incumbered by other modes of dealing: *Story* on Eq. Jur., sec. 86; *East India Co. v. Boddam*, 9 Ves. 464, 468; *Seton* 1336, 7, 8. And the indemnity should extend to any such costs, damages, and expenses as the defendants may be put to by the loss of the instrument: *Seton* 1335, form 5; *East India Co. v. Boddam*, 9 Ves. 469; *Lord Middleton v. Eliot*, 15 Sim. 531.

I see no objection to this direction for indemnity being included in the order made by the Official Referee. The plaintiff was suing for the money, and he could get it only by giving an indemnity.

I think, upon all the grounds the appeal fails, and must be dismissed, with costs.

CLOSE V. EXCHANGE BANK.

Interpleader—Divisional Court—Appeal from County Court—44 Vic. ch. 7. (O.)

An interpleader issue arising out of an action in the Chancery Division of the High Court of Justice was sent to a County Court for trial by order made in Chambers.

Held, that it was to be intended that the order was made under 44 Vic. ch. 7, (O.), rather than under the interpleader jurisdiction of the old Court of Chancery; and that being so, that a Divisional Court of the High Court of Justice had no jurisdiction to hear an appeal from the judgment of the County Court on such issue, and that such appeal should have been to the Court of Appeal under R. S. O. ch. 54, sec. 23.

[December 12, 1885.—*The Chancery Division.*]

AN appeal by the defendants in an interpleader issue from the judgment of the Judge of the County Court of the County of York, in favour of the plaintiff upon the trial of the issue. The interpleader order was made upon the application of the sheriff of York, who had seized

goods under an execution issued by the defendants out of the Chancery Division of the High Court of Justice, the goods being claimed by the plaintiff.

The interpleader order directed that the issue should be tried in the County Court.

Bain, Q.C., for the appeal.

Shepley, contra, took the preliminary objection that no appeal lay to the Divisional Court.

The following cases were referred to : *Barker v. Leeson*, 9 P. R. 107 ; *Beaty v. Bryce*, 9 P. R. 320 ; *Cole v. Campbell*, 9 P. R. 498 ; *Arkell v. Geiger*, 9 P. R. 523 ; *Christie v. Conway*, 9 P. R. 529 ; *London and Canadian L. & A. Co. v. Morphy*, 11 P. R. 86.

BOYD, C.—A code of practice and procedure for all cases of interpleader is provided by Rule 2 of the Judicature Act. This provision is made for the purpose of assimilating interpleading procedure in all branches of the High Court of Justice, and to supersede any variant or inconsistent practice theretofore existing: Judicature Act, secs. 12 and 53. This Rule 2 is to be so read and applied as to regulate the proceedings in all matters of interpleader, which are to be conducted under R. S. O. ch. 54, as extended by 44 Vic. ch. 7, (O.) It is to be intended that the order to interplead herein was made under 44 Vic. ch. 7, rather than that the now practically obsolete jurisdiction of the old Court of Chancery should be invoked to support the present appeal. The affidavit filed by the sheriff stated the nature and value of the property seized, and it is to be assumed that the Judge who made the order was satisfied that it was a proper case for sending the issue to the County Court. That being so, the Act gives to such an issue all the characteristics of an independent proceeding in the County Court, with a right of appeal to the Court of Appeal under R. S. O. ch. 54, sec. 23. I am very clearly of opinion that the Divisional Court has no jurisdiction, and therefore give effect to the pre-

liminary objection, but as a motion should have been made to strike out, I think it should be without costs, as in *Wansley v. Smallwood*, 10 P. R. 233.

FERGUSON, J.—This is an appeal from the decision of the Judge of the County Court of the county of York, in an interpleader issue that was ordered to be tried in that Court.

The writ of execution issued out of this Division of the High Court and was directed to the sheriff of the county of York. Upon his application the order for the trial of the issue was made.

The affidavit or one of the affidavits on which the application was made stated that the value of the goods seized and taken in execution was less than \$400.

A preliminary objection was taken by Mr. Shepley, counsel for the plaintiff (and respondent) Close, which was that the appeal should have been to the Court of Appeal and not to this Court, he contending that this Court had no jurisdiction in the matter.

Mr. Bain, counsel for the appellants, the bank and the liquidator, in support of the appeal, contended that the appeal was properly to this Division of the High Court, one of his arguments being that this issue sent to be tried in the County Court was in the same position as an issue formerly sent by the Court of Chancery (for trial) to a Court of inferior jurisdiction, the order not having been made as he contended under the Act 44 Vic. ch. 7. This question was argued at very considerable length.

The fifty-second section of the Judicature Act, provides that, *save as by this Act or by any rules of Court otherwise provided*, all forms and methods (as nearly as may be) of procedure which at the commencement of the Act were in force in any of the Courts whose jurisdiction was by the Act vested in the High Court under or by virtue of any law, general order, or rule whatsoever, and which were *not inconsistent with the Act or with any rules of Court*, might continue to be practised in the said High Court

of Justice, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so vested, if the Act had not been passed.

The twelfth section of the Act provides that the jurisdiction of the High Court of Justice and the Court of Appeal, respectively, shall be exercised (so far as regards procedure and practice) in the manner provided by the Act, or by such rules and orders of Court as may be made pursuant to the Act; and that where no special provision is contained in the Act, or in any of the rules or orders of the Court with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective existing Courts if the Act had not been passed.

Rule 2 of the Act provides that, with respect to interpleader, the procedure and practice at the time of the passing of the Act, used by the Courts of Common Law under the Interpleader Act, R. S. O., ch. 54, (save as altered by any Act passed during the then present session of the legislature) shall apply to all actions and to all Divisions of the High Court of Justice.

The effect of these provisions seems to be that the procedure and practice in interpleader matters arising in the Chancery Division of the High Court, shall be the same as the procedure and practice in such matters arising in the other Divisions of the Court; and that such procedure and practice shall be the same as those used by the Courts of Common Law, up to and at the time of the passing of the Judicature Act, except in so far as the same were altered by an Act passed during the same session of the legislature, as that in which the Judicature Act was passed, and that such procedure and practice shall be adopted.

During that session of the legislature was passed an Act respecting Interpleader, 44 Vic. ch. 7, by the first section of which it is, amongst other things, provided, that where the amount claimed under or by virtue of an execution in the sheriff's hands issued out of one of the

Superior Courts of law does not exceed the sum of four hundred dollars, exclusive of interest and sheriff's costs, or when the goods seized are not, in the opinion of the Judge or other person making the order, of the value of more than four hundred dollars, the order directing the issue to be tried may direct that the same shall be drawn up and tried in the County Court of the county in which the issue would, under the provisions of section 22 of the Interpleader Act, be tried, and that in such case the issue shall be drawn up and tried in the County Court, and that all subsequent proceedings therein up to and inclusive of judgment and execution shall be had and taken in the County Court, which shall have jurisdiction in the premises as fully as though the writ of execution had issued out of the County Court.

This Act seems to me clearly to contemplate that the proceedings shall in such cases be carried on in the County Court to the termination thereof, for the second section providing for the proceedings for and relating to the order for costs, and for obtaining money out of Court, when the same has been paid in by the sheriff, &c., gives to the Judge of the County Court who tried the issue, the same power and authority to make an order for the same as a Judge had theretofore had in such cases, and the last section provides that the Act shall be read with and form part of the Interpleader Act, ch. 54 R. S. O.

It appears, I think, to be discretionary with the Judge to whom the application is made, whether he will make an order for the trial of the issue in the County Court under the provisions of 44 Vic. ch. 7; but it seems to me quite clear that when such an order has been made, all the proceedings thereafter must be carried on in the County Court, excepting what is apparently an option given of applying for the order as to costs mentioned in the second section, as before the passing of the Act, in the original cause.

Then the twenty-third section of the Interpleader Act provides, that any party to any cause or proceeding before any County Court, or any County Court Judge under that

Act, who is dissatisfied with the decision of the County Court or Judge upon any question of law or fact arising in the course of such proceeding, may appeal from such decision to the Court of Appeal. And when it is borne in mind that the procedure and practice in interpleader matters arising in this Division, are the same as in such matters arising in a Common Law Division, and these the same as were used by Courts of Common Law, at and before the passing of the Judicature Act, save as altered by 44 Vic. ch. 7, and that this Act is to be read as part of the Interpleader Act, and that by the last mentioned Act all the proceedings to judgment and execution, *when the order for the trial of the issue is made under that Act*, shall be carried on in the County Court, I do not see any room to doubt that the appeal from the decision of the County Court Judge should be to the Court of Appeal.

But, as before stated, it was contended that the order for the trial of the issue in this case was not made under the provisions of the 44 Vic. ch. 7; and the case of *Barker v. Leeson*, 9 P. R. 107, was much relied on in support of this contention. In that case the learned Judge held that the application had not been made under the provisions of the Act, (44 Vic. ch. 7) and that the application for a new trial of the issue should have been made to the Court that had directed the issue. The County Court Judge had set aside the verdict and entered a nonsuit, and it was held that he had no power so to do.

The concluding clause of section 1 of 44 Vic. ch. 7, is as follows: "When an application is made for an order under this section upon the ground that the goods seized are not of the value of more than four hundred dollars, a list of the goods and of the value placed upon them shall be set out in the affidavit or affidavits upon which the application is based."

In *Barker v. Leeson* the learned Judge says that this did not appear to have been done, though the Master permitted an affidavit to be filed on the application before him, showing that on the sale the goods only produced

\$300 ; and that as the jurisdiction is only statutory, the officer had no power to dispense with what the statute required. In the present case it was contended that, because there was not contained in the affidavit a list of the goods, the application could not have been under the statute.

In *Barker v. Leeson* there was nothing to stand in the place of the list and value of the goods referred to in the statute, excepting the affidavit subsequently received showing the amount that the goods produced upon a sale. In the present case the affidavits on which the application was based, stated that the value of the goods seized was not more than \$400 ; and it appears to me that the important part of the section, so far as it has relation to this immediate subject, is that the value of the goods seized *shall not, in the opinion of the Judge or other person making the order*, be more than four hundred dollars. The order was made, and this fact would seem to show that such was the opinion of the Judge. At all events the order was made and it has not been appealed from or otherwise questioned. The case is for these reasons, if there were none other, distinguishable, in this respect, from *Barker v. Leeson*.

As to the contention that the order in this case was made under the powers that the Court of Chancery formerly had, which it was said were continued in the Chancery Division of the High Court, and that *Barker v. Leeson* is an authority in this respect, it appears to me only necessary to say, that section 9 of the Act, which provides that the High Court of Justice shall be deemed a continuation of the Courts therein mentioned respectively, provides also that such continuation shall be subject to the provisions of the Judicature Act, and that the order in *Barker v. Leeson* was made, (though I apprehend after the passing of the Act, 44 Vic. ch. 7,) before the coming into force of the Judicature Act, which, as I have already said provides for the procedure and practice in matters of interpleader arising in the Chancery Division, and that such

procedure and practice shall be adopted. That case cannot, in my opinion, be an authority in point governing the conclusion in the present case. And after having examined the statutes and authorities referred to on the argument, I am clearly of the opinion that the appeal in this case should have been (if at all) to the Court of Appeal, and that this Court has no jurisdiction to entertain it.

I think effect should be given to the objection, and that the appeal should be struck off the list.

I agree in saying that there should be no costs.

PROUDFOOT, J., was not present at the argument, and took no part in the judgment.

Appeal struck out, without costs.

MCLEAN V. HAMILTON STREET RAILWAY COMPANY.

Claim and counter-claim—Negligence—Libel—Inconvenience—Rules 127, (b.), 168, O. J. A.

In an action for damages for negligence, a counter-claim for libel was excluded, on the ground of the inconvenience which would arise in trying the two causes of action together, but leave to bring an independent action was given.

[December 18, 1885.—O'Connor, J.]

AN appeal by the defendants from the order of the Master-in-Chambers, striking out their counter-claim.

The plaintiff sued for damages for injuries sustained by him owing to the alleged negligence of the defendants; a tramway car of the defendants, on which the plaintiff was a passenger, having collided with another vehicle, and the plaintiff's arm having been broken by the collision.

After the commencement of the action the plaintiff published an article in a Chicago newspaper containing alleged defamatory allusions to the defendants, and the

defendants counter-claimed in this action for damages for libel.

On the plaintiff's application, the Master-in-Chambers struck out the counter-claim under Rules 127 (b) and 168, O. J. A., but gave the defendants leave to bring an independent action, and the defendants now appealed from the Master's order.

E. E. Kittson, for the appeal.

Aylesworth, contra.

O'CONNOR, J.—I think the provisions of the Judicature Act are wide enough to admit of two causes of action, both sounding in damages, and one as a counter-claim to the other, being tried together: *Gray v. Webb*, 21 Ch. D. 802; *McGowan v. Middleton*, 11 Q. B. D. 464; but I think it would be extremely inconvenient, and inexpedient, to try in one suit two causes of action in tort, each of which depends on nice distinctions of law and fact, and in one of which the Judge controls the law and the jury the facts, while in the other the jury are judges of both the law and the fact. I think, besides, the order made by the Master-in-Chambers was a reasonable one. I dismiss the appeal, with costs to be costs in the cause to the plaintiff.

PEEL V. PEEL.

Scale of costs—Surrogate Court—Case transferred to High Court.

In the case of an action transferred from a Surrogate Court to the High Court of Justice, the costs of the proceedings in the Surrogate Court previous to the transfer should be taxed on the scale provided by the Rules of 1858, *i. e.*, as nearly as possible on the County Court scale. *Re Harris*, 24 Gr. 459, and *re Osler*, 24 Gr. 529, explained and followed.

[December 21, 1885.—*Boyd*, C.]

THE proceedings in this action were begun in the Surrogate Court of the county of Middlesex, and were transferred to the High Court of Justice, Chancery Division, by order in Chambers.

The action was tried at London before *Boyd*, C., who directed judgment to be entered for the defendants with costs.

The Local Registrar at London taxed all the costs on the High Court scale, and the plaintiff appealed from his taxation, contending that the costs of the proceedings in the Surrogate Court should have been taxed upon the scale applicable to County Courts.

Hoyles, for the appeal.

R. M. Meredith, contra.

Re Harris, 24 Gr. 459; *Re Osler*, 24 Gr. 529; *Regan v. Waters*, 10 P. R. 364, were referred to.

BOYD, C.—In *re Harris* the costs were allowed according to the Court of Chancery tariff, the reason given being that no tariff of costs for contentious cases in the Surrogate Courts had been established; but in *Re Osler* it is declared that the Rules of 31st August, 1858, are in force, among which is one providing that the costs in cases in Surrogate Courts shall be as nearly as possible on the County Court scale. I cannot distinguish the present case in its facts from *Re Harris*.

It is probable that in that case attention was not called to the Rules of 1858, which *Re Osler* shews to be in force.

I must hold, under the combined effect of *Re Harris* and *Re Osler*, that these costs should have been taxed upon the scale mentioned in those Rules, and I refer the bill back to the officer to tax upon that scale.

BOULTON V. BLAKE.

Extraordinary discovery—Rule 285, O. J. A.—Discretion of Court—Information for purpose of pleading.

The right of extraordinary discovery must be jealously guarded, lest it be abused, and it should under Rule 285, O. J. A., be conceded only when it is clearly proved to be necessary for the furtherance of justice. An application to examine under Rule 285 is in the discretion of the Court, and that discretion cannot be said to have been wrongly exercised in allowing the defendant to examine the plaintiff and three witnesses before delivering the defence, in order to obtain for the purpose of pleading a knowledge of material facts, which the defendant could not otherwise get.

[December 23, 1885.—*Boyd, C.*]

AN appeal by the plaintiff from the order of the Master-in-Chambers, made under Rule 285, O. J. A., at the instance of the defendant, directing the examination of the plaintiff and three witnesses, after statement of claim and before defence delivered.

The action was upon the covenant in a lease for payment of rent, and the defendant, wishing to set up a surrender as a defence, made the application to examine the plaintiff and witnesses, in order to obtain a knowledge of the material facts necessary to be alleged in his defence.

Walter Barwick, for the appeal.

Small, contra.

BOYD, C.—The order for examination of the parties and some others interested in the estate was made by the Master upon the affidavit of the defendant's solicitor, that

without such discovery as he thereby hoped to attain, he could not properly plead to this action. He intends to rely upon a surrender in law, the effect of which would be to disentitle the plaintiff to recover on the covenants in the lease, and the facts leading up to and involving such surrender are not within the defendant's own knowledge, as he assigned over the leaseholds in 1880, and has had nothing to do with them since. I am not prepared on this state of facts to reverse the Master's order. I think it is plain that such discovery could be obtained after he had formally pleaded, in order to get such details as would enable him to amend and comply with the rules of Court as to particularity in pleading. To this effect is the scope of the observations of Bramwell, L. J., in *Philipps v. Philipps*, 4 Q. B. D., 127, 131. Should the right to discovery be withheld in these cases till the defendant has pleaded? That rests in the discretion of the Court, and I am not satisfied that the Master exercised his power wrongly in this case. No doubt this right of extraordinary discovery must be jealously guarded lest it be abused; and it should, under Rule 285, be conceded only when it is clearly proved to be necessary for the furtherance of justice. This order, of course, goes beyond mere discovery, which usually means what is procurable from the parties to the litigation, and the examination of the persons named may rank as evidence under Rule 285. But I do not think that the jurisdiction to make such an order [as is before me can be doubted, if the circumstances in evidence are such as to warrant its exercise. See *Central News Co. v. Eastern Telegraph Co.*, Bitt. R. 179, and in Appeal, S. C., 53 L. J. Q. B. D. 236.

The order should be affirmed, with costs in the cause to the defendant.

RE ENGLISH.

Settled Estates Act—Separate examination of married women—M. W. P. Act, 1884, (O.)

Upon a petition under the Settled Estates Act, BOYD, C., dispensed with the examination required by the Act of a married woman interested who lived out of the jurisdiction, but not of one who lived within the jurisdiction.

The Married Women's Property Act, 1884, (O.), does not apply to cases under the Settled Estates Act, where the woman had acquired the property before the passing of the former Act.

[December 23, 1885.—*Boyd, C.*]

THIS was a petition under the Settled Estates Act.

William Roaf, for the petitioner, applied for an order dispensing with the examination (required by the Act) of certain married women interested, one of them being resident without and the others within the jurisdiction.

BOYD, C.—To avoid delay and save expense, I am justified upon the authorities in dispensing with the separate examination of the married woman who lives out of the jurisdiction, in Manitoba: *Re Halliday*, L. R. 12 Eq. 199. But I fear that the others will have to be separately examined, as no special reasons exist to dispense with this precaution which is required by the Settled Estates Act. I thought that the late Married Women's Act might aid the applicant, but I find it has been held not to apply to such cases as this, where the woman had acquired the property before that Act: *Re Harris's Settled Estates*, 28 Ch. D. 171. The examination may be had before any special examiner nearest to the places of residence of the ladies.

RE ANDREWS.

Insurance moneys—Infants—Foreign trustee—Security—47 Vic. ch. 20, (O.)

A foreigner was appointed trustee for infants under 47 Vic. ch. 20, (O.) to receive insurance moneys, without being required to give security in this Province, on its being shewn that he had given security upon his appointment as guardian, to the satisfaction of a Court in the State where he and the infants resided. The insurance company were discharged upon payment to the trustee of the moneys in their hands.

[September 5, 1885.—*Ferguson, J.*]

GEORGE Andrews was insured by a policy in the Canada Life Assurance Company. The policy was endorsed by him in favor of his children, two being minors, and he died intestate without appointing any trustee to receive their shares.

The company admitted the claim and paid the shares of the adult children, and the guardian of the infants, who resided in Dakota, U. S. A., and was appointed guardian by a Court there, petitioned for the appointment of a trustee, under 47 Vic. ch. 20, sec. 12 (O.)

C. L. Ferguson, for the petitioner. The infants are willing that their guardian should be appointed trustee. He has given proper security in a foreign Court and should not now be required to give security here, which it would be impossible to do. This is distinguishable from *Re Thin*, 10 P. R. 490, where no security was given. Petitioner is entitled to his costs: 47 Vic. ch. 20, sec. 15 (O.)

W. F. Burton, for the insurance company. The very object of the statute is to enable the company to pay and discharge the claim by payment to a trustee appointed by this Court. It appears that there is "no one competent in this Province" to receive the shares of the infants. The order should provide that payment to the trustee shall be a sufficient discharge to the company.

FERGUSON, J., directed an order to issue appointing the guardian trustee on satisfactory evidence being furnished that he had given substantial security in Dakota according

to the practice of the Courts there, without further security being given here ; and this being done, the order was made providing that payment to the trustee should discharge the company. Costs to both parties out of the fund.

McKINDSEY V. ARMSTRONG.

Judgment—Appeal—Certificate—Garnishee—Payment over — Restitution—
45 Vic. ch. 6 (O.)

An appeal from the order of a County Judge directing payment over to the plaintiff by a garnishee of moneys in his hands was allowed by this Court in a former judgment (10 A. R. 17.)

It appeared that the garnishee had paid over the moneys in his hands before the appeal was initiated.

Held, that the certificate of the former judgment properly contained an award of restitution of the money so paid, which the Court had authority to make under 45 Vic. ch. 6 (O.)

[October 14, 1884.—*The Court of Appeal**.]

THIS was a motion made by the plaintiff on the 13th of October, 1884, to vary the certificate of the judgment of the Court (10 A. R. 17).

Allan Cassels, for the motion.

Aylesworth, contra.

The judgment of the Court was delivered by PATTERSON, J.A.—We gave judgment on the appeal in this case on 28th May last, (10 A. R. 17.) The learned Judge of the County Court of the county of Halton had made an order for the payment over by one Brain, as garnishee, of \$238.67, the amount due on the plaintiff's judgment against the defendant, out of money which the learned Judge held to be money of the defendant in the hands of Brain. We were of opinion that the fund was

* *Present*.—HAGARTY, C.J.O., PATTERSON and OSLER, JJ.A.

money which Brain, as trustee under a deed made by the defendant's father, had a discretion, which he had not exercised, to pay to the defendant or to invest for his use in the purchase of a homestead, and was, therefore, not a garnishable debt, and on that ground we allowed the appeal.

It appears, and it is said that affidavits were in Court on the hearing of the appeal, although not brought distinctly to our attention, to shew that immediately after the making of the order in the County Court, and before proceedings in appeal were taken, the garnishee had, in obedience to the order, paid over the money to the plaintiff. It would therefore have been proper for this Court to have, as part of our judgment, ordered restitution. That power is expressly given to the Court by the statute 45 Vic. ch. 6, (O.) which for the first time gave an appeal from an order made in proceedings in a County Court against garnishees, and which made applicable to County Court appeals several sections of the Court of Appeal Act, including section 23, which empowers this Court to award restitution or to make such further order as the case may require.

The certificate signed by the Registrar did, in fact, contain an award of restitution, although not directed in terms by the judgment delivered in allowing the appeal.

Mr. Allan Cassels, for the plaintiff, has moved to strike out that part of the certificate, leaving simply the decree allowing the appeal with costs, contending that the right to the money, or the right of Brain, by an exercise of his discretion, to pay in money, and to pay as he has done to this plaintiff, may properly be the subject of further contest in the Court below.

Mr. Aylesworth opposes the motion on the ground that the certificate correctly carries out the effect of the judgment as applied to the circumstances.

We think the certificate is proper and ought not to be changed.

When the money is restored to the hands of the trustee, he can deal with it in whatever way his duty as trustee requires or permits. Our finding that he had not exercised

the discretion vested in him by the deed, before the attempt to garnish the money, was chiefly founded upon his own evidence; and by refusing now to treat his payment as made in any other character than as garnishee, we act on the facts as we understand them; but we do not interfere with his rights as trustee of the fund of which this money forms a part.

Even if there appeared to be force in the suggestion that Brain may after all, by this payment of the money, have exercised, either in intention or in effect, his discretion as trustee to pay in money instead of investing in land, we should be careful to avoid giving countenance to the idea that the payment to the plaintiff in place of the *cestui que trust* could be justified by any supposable relation to the proceedings which we have held not to have been warranted when they were taken.

We refuse the motion, with costs.

PAISLEY V. BRODDY.

Action on foreign judgment—Defence—Covenant—Foreclosure—Concealment—Nudum pactum—Fraud—Matters pleadable in original action.

The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant.

Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defence to this action.

Held, also, that an allegation that G. had agreed to take the land in full satisfaction of his debt shewed no defence, but a mere verbal agreement without consideration.

Held, also, that an allegation that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of *fi. fa.* against him were retained in the sheriff's hands under a fraudulent agreement between G. and the plaintiff, in order to sustain the proceedings against the defendant, shewed no fraud, and was no answer to the action.

Per WILSON, C. J.—The defendant was not at liberty to set up in answer to this action matters which could have been pleaded in the original cause.

[November 5, 1885.—*Wilson, C. J.*]

[December 19, 1885.—*The Common Pleas Division.*]

AN appeal by the plaintiff from the order of Mr. Winchester (sitting for the Master-in-Chambers) refusing a motion to strike out paragraphs of the statement of defence.

Schoff, for the appeal.

T. C. Milligan, contra.

WILSON, C. J.—The statement of claim shews that the plaintiff obtained a decree on the 5th of November, 1884, against the defendant in the Court of Queen's Bench for the Province of Manitoba in a cause on the equity side of the said Court, wherein the now plaintiff was plaintiff, and the now defendant was defendant.

The decree was obtained on a covenant made by the defendant in a conveyance of lands in Manitoba made by the plaintiff to the defendant, whereby the defendant covenanted to indemnify and save harmless the plaintiff from payment of a mortgage made by the plaintiff to one Francis Gilmore over the lands so conveyed to the defendant. By the said decree the defendant was ordered to pay to the said Francis Gilmore the sum of \$2,373.35, together with interest thereon from the 10th of July, 1884, &c. Under and pursuant to the decree the Master of the said Court took the accounts and made the enquiries thereby directed, and on the 16th of January, 1885, made his report thereon, and found the amount due to the said Gilmore up to the said date to be \$2,559.17, and to the said plaintiff for his costs of suit in the causes referred to in the decree, the sum of \$135.73, which said report was duly filed and is now confirmed.

The said Gilmore obtained judgment against the plaintiff for \$2,379.12 in the Court of Queen's Bench for Manitoba, and issued execution thereon against the plaintiff for the amount of the same and his costs of suit, and said executions are now in the hands of the sheriff of the Eastern Judicial District of Manitoba against the plaintiff's goods and lands.

The said sums have not, nor has either of them, or any part thereof, been paid by the defendant either to the said Gilmore or to the plaintiff.

The plaintiff claims :

1. Payment of the sum of \$135.73, together with interest thereon from the 16th of January, 1885.

2. That the defendant be ordered to pay to the said Francis Gilmore the sum of \$2,559.27, with interest thereon from the 15th day of January, 1885.

Or in default thereof that the plaintiff be at liberty to issue execution on behalf of the said Gilmore. Or in case of default of payment of the same by the defendant to Gilmore, and if the plaintiff herein shall pay any part of the same to Gilmore, then that the defendant pay such part thereof to the plaintiff, otherwise the plaintiff to be at liberty to issue execution against the defendant for the amount so paid.

And for such other and further relief as the plaintiff may be entitled to.

The statement of defence shewed :

2. That the plaintiff and defendant and two others formed a syndicate for the purpose of dealing in lands in the city of Winnipeg, and that during the month of March, 1882, the syndicate purchased from the said Francis Gilmore certain lands in the city of Winnipeg for the sum of \$4,000, of which \$2,160 was paid in cash and a mortgage to secure the balance was given to the said Gilmore; and although the defendant paid the sum of \$2,160 to Gilmore, the conveyance of the lands was made to the plaintiff; but subsequently, as he was becoming involved in financial difficulties, it was deemed advisable by the members of the said syndicate that the lands should be conveyed by the plaintiff to the defendant, which was accordingly done: and the defendant received the said conveyance, and executed the same, as a trustee for the members of the syndicate, of which the plaintiff was one; and thereafter, but prior to the obtaining of the judgment alleged to have been obtained against the plaintiff, the said Gilmore filed

his bill of complaint on the Equity side of the said Court of Queen's Bench in Manitoba for the purpose of foreclosing the said mortgage, and such proceedings were had that Gilmore became entitled to the said lands, and the said Gilmore took, and still continues to retain, possession of the same, and to receive the rents and profits therefrom ; and the defendant says that the judgment alleged by the plaintiff to have been recovered against him was obtained by the plaintiff fraudulently concealing from the Court the facts hereinbefore set forth.

What defence is that ? Why could not Gilmore sue upon the mortgage for the debt if he liked ? The effect of it is to reopen the foreclosure : *Lockhart v. Hardy*, 9 Beav. 349, 10 Jur. 532.

The 3rd paragraph is to the like effect as the 2nd. The concealment of the foreclosure and that Gilmore was then in the possession of the lands.

The 4th paragraph is to the like effect.

The 5th paragraph is that Gilmore agreed with the defendant to take the land in full satisfaction of his debt, and as Gilmore has taken possession of the land in accordance with the agreement, the judgment obtained by Gilmore against the plaintiff has thereby been satisfied. This shews no defence, a mere verbal agreement without consideration : *Cross v. Sprigg*, 18 L. J. Ch., N. S. 204.

The 6th paragraph is that the plaintiff has sustained no damage by the judgment and execution against him, and that the executions are retained in the sheriff's hands, under a fraudulent agreement between Gilmore and the plaintiff, in order to take proceedings against the defendant.

There is no fraud shewn by this paragraph. It is only right the defendant who is to indemnify the plaintiff should pay the debt he agreed to pay, and besides it is substantially his own debt.

As there was no reason why the defendant could not have pleaded all these matters in and to the action, suit or proceedings, which were taken against him by the plaintiff in the Court in Manitoba, if they constituted a defence,

as going to the merits of these proceedings, and he did not do so, he is not at liberty now in an action in this Province upon that foreign decree to set up in answer to such action matters which could have been pleaded to these proceedings in the original Court: *Henderson v. Henderson*, 6 Q. B. 288; *Messina v. Petrocchino*, L. R. 4 P. C. 144.

The case of *Abouloff v. Oppenheim*, 10 Q. B. D. 295, was referred to, but in that case there was certainly fraud on the part of the plaintiff in recovering for goods, as if in the possession of the defendant while the plaintiff was himself in possession of them and must have known the defendant had not got them. In that case the very point set up as fraud was in issue in the original action, and that fraud in the original action was allowed to be pleaded in the action in England upon that judgment. The matter which was in issue in the action which was brought in England upon that foreign judgment could not be brought in issue in England upon an English judgment recovered under the like circumstances. In the case before me there was no fraud in not informing the Court that there had been a foreclosure and that Gilmore was in possession of the land foreclosed.

I must make the order to strike out the pleas according to the motion, which I do, with costs.

The defendant appealed to the Common Pleas Divisional Court.

Tilt, Q.C., for the appeal.

Schoff, contra.

ROSE, J.—This is an appeal from the judgment of Wilson, C. J., striking out all the paragraphs of the statement of defence save the first.

On the argument the Court expressed an opinion that the judgment was clearly right as to the 2nd, 3rd, 4th, and 6th paragraphs, but desired to further consider the 5th.

Upon reading that paragraph more closely, it is clear it does not state when the agreement to take the land in satis-

faction of the mortgage debt was made, or that it was prior to the foreclosure, or that the foreclosure was permitted in reliance upon it. Indeed, as it is stated that such agreement satisfied the judgment of Gilmore against Paisley, it would seem that the pleader desired it to be inferred that the agreement was made subsequent to both the foreclosure and the judgment against the plaintiff. If so it would clearly be no defence. It would be a *nudum pactum*, and could not be set up in answer to the claim.

The most that the pleadings as framed discover is, that Gilmore has placed himself in a position to be redeemed. I suppose the defendant is not anxious to avail himself of such right if it still exist.

I have not found it necessary to consider the defendant's right to raise these defences, having allowed judgment to go against him by default in Manitoba.

In my opinion the appeal fails, and must be dismissed, with costs.

CAMERON, C.J., and GALT, J., concurred.

Appeal dismissed, with costs.

CANADIAN PACIFIC R. W. CO. v. GRANT.

Claim and counter-claim—Cross-judgments—Set-off—Solicitors' lien.

The plaintiffs sued for freight for the carriage of timber, and the defendant pleaded a counter-claim for neglect and delay in the carriage of the timber.

The judgment at the trial was as follows: "The verdict will be for the plaintiffs for \$2,122, and for the defendants upon their counter-claim for \$1,420, and each party will be entitled to costs against the other, as if the statement of claim and counter-claim were separate actions, and I direct that judgment be entered accordingly,"

Held, [reversing the decision of the Master in Chambers], that the judgments recovered by the plaintiffs and defendants must be treated as judgments in separate actions, and, therefore, that in setting off the judgments the claim for costs of the defendants' solicitors upon the judgment against the plaintiffs should be protected.

[December 19, 1885.—*The Common Pleas Division.*]

THIS was an appeal by the defendants' solicitors from the order of the Master in Chambers ordering a set-off of judgments, without regard to the claim of the defendants' solicitors for costs. The facts fully and clearly appear in the judgment appealed from which was as follows:

"This is a motion by the plaintiffs to set off a judgment of the defendants recovered by them on their counter-claim in this cause against the plaintiffs, against a judgment by the plaintiffs on their claim in the same suit.

The plaintiffs sued for freight payable by the defendants for the carrying of timber. The defendants pleaded a counter-claim against the plaintiffs for neglect and delay in the carriage of the timber.

Both parties succeeded at the trial. The case was tried before the Hon. Mr. Justice Armour, without a jury.

The plaintiffs recovered judgment against the defendants for \$2,122, for freight, and the defendants by the same judgment recovered from the plaintiffs \$1,420, for breach of plaintiffs' agreement, by delay in delivery of the timber, for the carriage of which the plaintiffs have recovered their judgment.

Both parties have recovered costs. The defendants' costs against the plaintiffs are \$173.19.

The objection to the set-off is an alleged lien for costs by defendants' solicitors.

As to the set-off of the \$1,420 there is no question made, except indeed as to the right of lien of the defendants' solicitors on that sum for their attorney and client costs in the cause, beyond the \$173.19, the party and party costs.

The words of the judgment of the learned Judge are :

"The verdict will be for the plaintiffs for \$2,132, and for the defendants upon their counter-claim, for \$1,420; and each party will be entitled to costs against the other, as if the statement of claim and counter-claim were separate actions; and I direct that judgment be entered accordingly, in and after," &c., &c.

Mr. Clark, the experienced taxing officer, has therefore taxed the costs of the parties as follows: He has taxed the costs of the plaintiffs on their claim, as though the plaintiffs had wholly succeeded in the suit—and in like manner, he has taxed the defendants' costs on the counter-claim, as though the defendants had wholly succeeded in the suit. I suppose this to be right, according to the learned Judge's direction. I had some doubt at first as to the meaning to be attributed to the above words of the judgment, as respects costs. I come to the conclusion that they are meant to apply merely to the quantum of costs, and were not intended to vary and do not vary the rights of the parties to the costs, from the ordinary effect of a general judgment for costs. That in fact they merely point out a certain principle of taxation.

The rights on this motion then are left to the general law, and the law here does not seem to have been changed by the Judicature Act. Rule 436 applies, but I do not think it alters the previous law, and that law, which was substantially the same in equity and at common law, is still the rule. I may say that there is a rule in England not favourable to the lien of the solicitor, which is not in force here: Order 65, Rule 14, *Wilson's Judicature Act*,

4th ed., page 535. See on this *Edwards v. Hope*, 14 Q. B. D. 922.

Our Rule of Court, No. 52, of 1856, which seems to be in force, (see Rule 445 O. J. A.) is in these words "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided nevertheless that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." The terms, "damages and costs," in this rule apply only to damages or costs, between adverse parties, in separate suits: Arch. Prac. 13th Ed. p. 144; and the solicitor's lien extends only to the balance which is ultimately to be paid over to the client upon the general and final result of the cause, and whatever costs may be due to the opposite party in the particular cause, whether they are the costs of interlocutory proceedings or otherwise, he has a right to deduct without regard to the amount which may be due from the client to the solicitor; Arch. Prac. 13 Ed. p. 445. But no set-off of separate judgments will be allowed even though they arise out of the same award, without satisfying the solicitor's lien, *Ib.* p. 145.

It would seem therefore that there may be a set-off here, unless there is something special that prevents it.

I will not enter into a question here, which I have seen mentioned, as to the alleged difference in the matter I am here discussing, between the case of a counter-claim and the case of a set-off. For the claim and counter-claim are so naturally connected that judgment could not justly be given for the one without at the same time considering the other. Plaintiffs have recovered for freight. Defendants counter-claim that plaintiffs have broken their agreement under which the freight was earned, to defendants' damage, and upon that the defendants have recovered. The claim and counter-claim should therefore be set one against the other. They do not properly constitute two actions. The counter-claim is only not a set-off because it sounds in damages. It is, really, properly a deduction. But

these matters would be "mutual credit" in bankruptcy. I refer to *Makeham v. Crow*, 15 C. B. N. S. 847; and to *Peat v. Jones*, 8 Q. B. D. 147. Suppose defendants to be bankrupt and the plaintiffs to prove against the estate, the defendants would be allowed a deduction for their counter-claim as a "mutual credit." I mean that the two claims are so necessarily connected together, that the less, which ever it was, should be deducted from the larger, which ever it was, and the recovery be for the balance only. They are not independent causes of action, nor can the claim and counter-claim be properly looked upon as two actions.

Then I think upon the authority of the cases which have been much cited lately, that as the rights here depend upon one judgment given in the same suit, the costs may be set off without regard to the lien of the solicitors.

See *Pringle v. Gloag*, 10 Ch. D. 676; *Wright v. Chard*, 4 Drew. 702; *Taylor v. Popham*, 15 Ves. 72; *Haynes v. Gillen*, 21 Gr. 15; *Bawtree v. Watson*, 2 Keen 713; *Gwynn v. Krous*, 7 Irish Equity 274; *Robarts v. Buë*, 8 Ch. D. 198."

Wallace Nesbitt, for the appellants.

Watson, for the respondents (plaintiffs.)

ROSE, J.—It seems to me the order of my learned brother Armour as to costs was in effect as follows: The plaintiffs will be entitled to enter judgment for \$2,122 and costs, and the defendants will be entitled to enter judgment for \$1,420 and costs, as if the statement of claim and counter-claim were separate actions.

Upon this direction the plaintiffs were entitled to enter judgment and issue execution against the defendants for the amount of debt and costs, and the defendants to enter judgment and issue execution against the plaintiffs for the amount of damages and costs. The plaintiffs in fact did so enter judgment and issue execution.

No question arises as to the principle of taxation. Both parties seem content with the rulings of the taxing officer.

If the judgments are to be treated as judgments in separate actions it is admitted as too clear for argument that set-off will not be ordered to the prejudice of the solicitor's lien for costs. *Mercer v. Graves*, L. R. 7 Q. B. 499, is an interesting decision on the question, and the more so as it comments on the somewhat wide language of Cairns, L. C., in *Ex p. Cleland*, L. R. 2 Ch. App. 808. Cockburn, C. J., at p. 503, refers to *Chit. Arch. Pr.* pp. 139, 140 (12 ed.,) and says, "Although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, where, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs." And per Blackburn, J., p. 504, "When execution is about to be executed, and the interference of the Courts is asked to allow the defendant to set off a cross judgment, the Courts say: 'We will not interfere to prevent execution so as to take the judgment out of the hands of the attorney simply because there are cross debts, unless the attorney's costs be first satisfied.'" Lush, J., at p. 506, said, that an application to the Court to allow a cross judgment to be set off against another is to the discretion of the Court, "and is only granted on the terms that he who asks equity must do equity by first paying the attorney his costs."

In *Pringle v. Gloag*, 10 Ch. D. 676, Jessel, M.R., in very strong language stated that it would be inequitable to allow the solicitor's claim for costs to prevail against an application to set off sums of money ordered to be paid on cross claims under an award.

This decision is referred to by Brett, M.R., in *Edwards v. Hope*, 14 Q. B. D. at p. 926, where he says that the observation of the late Master of the Rolls "would apply if the claims were in the same action instead of being in distinct actions."

In the case of *In re Brown—Ward v. Morse*, 23 Ch. D. at p. 385, Baggallay, L.J., extracts from *Baines v. Bromley* 6 Q. B. D. 695, the rule laid down by Lord Justice Brett

as to the principle of taxation in an action with cross-claims where no other order is made.

The question then is, did the order of the learned Judge have the effect of putting the judgments on the claim and counter-claim in the position of judgments in separate and independent actions? If so, then the order allowing the set-off should have protected the claim for costs of the defendant's solicitors.

The plaintiffs' solicitors seem to have treated the judgments as quite separate and distinct, for they taxed their costs and entered judgment for the claim and costs, and issued execution thereupon long before the defendants' solicitors taxed their costs. The dates are as follows: the plaintiffs' judgment was entered on the 24th of March, 1884, for \$2,122, amount of judgment and \$183.59 costs, and the defendants' solicitors closed the taxation of their costs on the 7th of October, 1885, having delayed to enable them to carry the case to the Court of Appeal in an endeavor to obtain a reversal of the judgment of first instance.

I cannot read the direction "that judgment be entered accordingly" as other than a direction that the judgment be entered as if the claim and counter-claim were separate actions, and therefore think that the judgments must be treated as judgments in separate actions.

In my opinion the appeal must be allowed, with costs, and the order of the learned Master varied so as to protect the claim for costs of the defendants' solicitors.

CAMERON, C. J., and GALT, J., concurred.

Appeal allowed, with costs.

MCNABB V. OPPENHEIMER.

*Rescinding order for ca. sa.—Jurisdiction of Judge who made the order—
Discharging defendant..*

A Judge in Chambers has no power to rescind his own order for a writ of *ca. sa.* or to discharge the defendant from custody after the order has been acted upon.

{[December 22, 1885.—*Rose*, J.]

THIS was an application to *Rose*, J., to rescind an order for a writ of *ca. sa.* granted by himself, or to discharge the defendant from custody.

T. C. Milligan, for the defendant.

Masten, for the plaintiff.

ROSE, J.—It is contended I have no power to rescind my own order after it has been acted upon.

2. That I have no power to discharge the defendant, counsel citing the case of *The Bank of Montreal v. Campbell*, 2 U. C. L. J. N. S. p. 18.

Mr. Milligan cited *Kidd v. O'Connor*, 43 U. C. R. at p. 200, as shewing that a Judge could rescind his own order when made *ex parte*. The observations of Harrison, C. J., in that case were wide enough to support the contention. The reported words are: "There is nothing to prevent an application being made to a Judge to rescind his own order when made *ex parte*; *Shaw v. Nickerson*, 7 U. C. R. 541; and in such a case it is not improper to make application to the Judge before applying to the Court by way of appeal: *Day v. Vinson*, 9 L. T. N. S. 654. See further *Rennie v. Beresford*, 3 D. & L. 467; *Ross et al. v. Grange*, 4 P. R. 180."

It was not material to the consideration of that case for the learned Judge to express an opinion on the question, and it seems to me he did not intend to do more than state the effect of the cases he referred to. Upon reference to these cases and some others, to which I will refer, it will, I think, appear that they afford no authority for the proposition contended for.

In *Shaw v. Nickerson*, Robinson, C. J. said, p. 543: "Mr. Justice Sullivan, sitting in Chambers, must be allowed to have authority, in his discretion, to open again an order which has been granted by himself; or even to rescind it before it has been carried into effect, upon his discovering that he has made it inadvertently, or that he has been surprised into making it by any perversion or concealment of facts; but here all that was done was to suspend the order, that the opposite party might be heard."

It will be seen that the facts as stated did not require an opinion as to the power of a Judge to rescind his own order; and the learned Judge carefully abstained from expressing any opinion that the power existed to rescind an order after it had been carried into effect. Even if, in the present case, it had not been carried into effect, I cannot say that I granted it inadvertently, or was surprised into making it by any perversion or concealment of facts.

In *Day v. Vinson* the Court were considering a certificate granted by Erle, C. J., to entitle the plaintiffs to costs of proving a certain document.

The defendant was moving for a rule *nisi* to set aside the certificate on the ground of irregularity in that it was not granted at the trial in conformity with sec. 117 C. L. P. Act, 1852.

Pollock, C. B., said, "If the certificate which has been granted be irregular, it is to be presumed that Erle, C. J., on application, will set it aside. We cannot entertain an application to review or set aside an order made by a Judge on an *ex parte* statement, before an opportunity has been given to the Judge, by an application to him for that purpose, to *amend* his own order if he thinks fit so to do after hearing both sides."

This decision must, it seems to me, also be read with reference to the facts before the Court.

It will be observed that there is nothing to shew that the certificate had been acted upon and the word "amend" italicised above, does not indicate a matured opinion that the Court thought a Judge could rehear and rescind an order granted by him after it had been acted upon.

Rennie v. Beresford, is cited in *Ross v. Grange*, and the point decided is stated by Alderson, B., "If there be any objection to the *mode of compliance with the order* which I made at Chambers, that is a proper matter to go to Chambers again; for application should be made to the Judge to enforce his own order. *It is only proper to come to the Court where you deny the exercise of the Judge's discretion at Chambers.*"

In *Lady DelaPole v. Dick*, 29 Ch. D. 35, an order was made directing the defendant to pay money into Court, where it was to be carried to the credit of an action for administering the estate of a testator whose executrix was the plaintiff in the present action. The defendant went abroad without complying with the order. An application was made to Mr. Justice Kay, who made the order, for leave to appeal so as to have the order varied by ordering the defendant to pay the money to the plaintiff, and for time to pay it into Court in the administration action, such an order being capable of being better enforced against the defendant's property than the order as originally framed.

His Lordship granted the leave, "considering that he had no jurisdiction to vary the order himself," and the Court of Appeal subsequently varied the order.

In *Flower v. Lloyd*, 6 Ch. D. 297, Jessel, M. R., said (p. 299): "The question which we have to decide is whether, final judgment having been pronounced by the Court of Appeal dismissing an action with costs, the plaintiff in that action is entitled by motion to apply for leave for a rehearing of the appeal before the Court of Appeal, on the ground of subsequent discovery of facts which shew or tend to shew that the order of the Court of Appeal was obtained by a fraud practised on the Court below. If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy." And the motion was held not within the jurisdiction of the Court, and was refused.

In *Re Swire—Mellor v. Swire*, 30 Ch. D. 239, the Court of Appeal altered the record of its order after it was drawn up, passed, and entered, so as to make it conformable to the order which the Court had pronounced. As it was drawn up, it was open to be contended that it decided questions which had not been before the Court.

The care with which the right to so vary the order was considered makes it evident that the Court did not deem that there was any power to reconsider the decision, at least there is no such suggestion, and the case there referred to of *In re St. Nazaire Co.*, 12 Ch. D. 88, directly decided that under the Judicature Acts a Judge of the High Court had no jurisdiction to rehear an order made by himself, or any other Judge, the power to rehear being part of the appellate jurisdiction which is transferred by the Acts to the Court of Appeal. During the argument Jessel, M. R., said: "A Judge can always reconsider his decision until the order has been drawn up."

Glasse, Q. C., said, "Where material facts have been kept back the Court will be anxious to set the matter right, and the utmost liberality will be shewn as to leave to amend: *Budding v. Murdoch*, 1 Ch. D. 42." To this Jessel, M. R., replied, "I never went so far as is represented in the head-note to that case."

I am of the opinion I have no jurisdiction to reconsider my order, or to rescind it.

As to the second point. The case cited of the *Bank of Montreal v. Campbell*, referred to in *Kidd v. O'Connor*, p. 202, is expressly in point, and I am unable to hear an application to discharge the defendant from custody.

I fear the defendant must move the Divisional Court for relief, when both this decision and that granting the order may be considered.

The motion must be refused, with costs to be paid to the plaintiff. Proceedings on this order stayed until after the next sittings of the Divisional Court.

Since preparing the above, I have had my attention called by my learned brother Osler to a decision of Field,

J., in *London and Lancashire Fire Ins. Co. v. British Am. Ass. Co.*, 52 L. T. N. S. 385-6, where at p. 386, he said he "had no power to overrule his own previous order," and hence gave leave to appeal.

SCHRAGG V. SCHRAGG.

Solicitor and client—Costs—Payment—Delivery of bill.

Solicitors retained out of moneys in their hands, belonging to their client, sufficient to pay their costs, and handed the client a cheque for the balance. The client took the cheque but did not cash it until she had written to the solicitors stipulating that the cashing should be without prejudice to her right to recover a larger sum, if such was due her.

After the lapse of a year from the receipt of the cheque, the client applied for an order for the delivery of a bill of costs.

Held, that the circumstances did not amount to payment of the costs, and the order for delivery was made.

Re Sutton, 11 Q. B. D. 377, distinguished.

[December 23, 1885.—*Boyd*, C.]

THE solicitors for Mrs. Ligner, one of the parties to this action, retained out of moneys of their client in their hands sufficient to pay their costs of the action, and handed their client a cheque for the balance, which the client accepted and afterwards cashed, first making the stipulation, in a letter to the solicitors, that the cashing of the cheque should be without prejudice to her right to recover a further amount from them, if she could shew that more was due.

The client, after the lapse of a year from her receipt of the cheque, applied to the Master-in-Chambers for an order for the delivery of a bill of costs.

The solicitors answered the application, contending (1) that a bill had been delivered; and (2) that there had been payment more than a year before.

The Master held that no signed bill had been delivered and that the circumstances did not amount to payment and therefore ordered the solicitors to deliver a bill.

From this order the solicitors appealed to a Judge in Chambers.

Holman, for the appeal.

Aylesworth, contra.

BOYD, C.—I do not think I should interfere with the Master's conclusion of fact that no signed bill was delivered. That being so, the matter is reduced to one point, whether there has been payment of the solicitors' costs for a year before this application. For that *Re Sutton*, 11 Q. B. D. 377, is cited, but it does not apply to the facts here in evidence. There was found to be a settling of accounts in that case, upon which a balance was coming to the client, who accepted payment of that balance from the solicitor as correct, and that dealing was held to be equivalent to the payment of the bills of costs. Here there was no settlement of accounts accepted as correct, but an express stipulation that the cashing of the solicitors' cheque should be without prejudice to the client's rights. I have, therefore, to dismiss the appeal, with costs to the client in any event, at the close of the taxation.

See *Re Harper*, 10 Beav. 284, and *Re Angove*, 46 L. T. N. S. 280.*

* Reversed in C. A., 26 Sol. J. 417.—REP.

STANDARD INSURANCE COMPANY V. HUGHES.

Interpleader—Claimants—Attaching creditors—Appeal.

Hell, following *Leech v. Williamson*, 10 P. R. 226, that attaching creditors may be "claimants" within the meaning of the Interpleader Act. Although *Macfie v. Pearson*, 8 O. R. 745, in effect decides that the execution creditor, who has seized before process against the defendant as an absconding debtor has issued, is to be paid in priority, yet that decision having been rendered by consent in a summary way, is not binding upon the claimants in this case, who may choose to litigate upon issues which can be carried to appeal.

[December 23, 1885.—*Boyd, C.*]

AN application by the sheriff of Kent for an interpleader order, where claims to the proceeds of the sale of goods seized were made by attaching creditors under the "Absconding Debtors' Act," execution creditors, and creditors certificated under the "Creditors' Relief Act." The sheriff had seized under the execution before process had issued under the Absconding Debtors' Act.

Holman, for the sheriff.

Aylesworth, and *Seton Gordon*, for the attaching creditors.

Masten, for the execution creditors.

W. H. P. Clement, for the certificated creditors.

BOYD, C.—This interpleader matter was referred to me by the Master. Objection was made that the attaching creditors were not such claimants as were embraced within the provisions of the Act as to interpleader. This is answered by *Leech v. Williamson*, 10 P. R. 226. It would be unfortunate if there was not the right to a summary remedy; had there not been, I should feel little difficulty in allowing the sheriff to avail himself of the old equitable jurisdiction of this Division, and permit him to bring an action of interpleader, as in *Child v. Mann*, L. R. 3 Eq. 806.

The law, by its enactments as to absconding debtors and creditors' relief, has placed the sheriff in an embarrassing position, and I think the Court should exert itself to extricate him, if possible, from the confusion arising out of the

conflicting and ill-defined claims of those who seek to benefit by his services. *Macfie v. Pearson*, 8 O. R. 745, does not in terms decide that the execution creditor who has seized before process against the defendant as an absconding debtor has issued is to be paid in priority. That is probably the result of the decision, having regard to the old law. But as it was rendered by consent in a summary way it is not binding upon the present claimants, as they may choose to litigate upon issues which may be carried to appeal.

I understand there is a surplus of some \$200, even after the first execution is paid in full. But apart from this the first attaching creditor by his letter insists that the first execution creditor has no priority, and there should be an issue as to this. There should also be issues as to the subsequent creditors who file certificates by which they virtually assert a claim to the fund ratably as against the first execution, unless they withdraw or allow their rights to be summarily adjudged. The claim of the second attaching creditor against the first execution creditor may be barred, as he renounced any pretensions to that share of the fund in open Court. But that could as well have been done by letter or notice to the sheriff.

I remit the matter to the Master in Chambers to deal with and frame the issues, if any.

CONMEE ET AL. V. CANADIAN PACIFIC RAILWAY
COMPANY (No. 2).

Causes of action—Separation—Consolidation.

The plaintiffs in their first action claimed from the defendants a sum of \$200,000 as the balance due upon a construction contract, and in this action, begun some time after the first, they claimed from the same defendants a sum of \$3,000, the amount of an account for goods sold and delivered. The cause of action herein arose before the commencement of the previous action. The first action was practically consolidated with an action of the defendants against the plaintiffs in the Chancery Division.

Held, that the two claims should have been made in the one action, and that it was a proper exercise of discretion to leave the claim in this action to be tried with the claim to which it should originally have been joined.

[January 2, 1886.—*The Common Pleas Division.*]

THIS was an action for \$3,000, the amount of a store account, for goods sold and delivered to the defendants. Two other actions (cross actions) between the same parties, in which very large amounts were involved, and which were practically consolidated by orders made in them (see *ante* p. 149), were begun before this one. The claim in this action had accrued due before the commencement of the other actions, and was in no way connected or mixed up with the contract in question in those actions, or with any matter involved in the pleadings therein; the transactions in question herein being wholly independent.

In this action a motion was made, under rule 80, O. J. A., for judgment, and the only reason shewn by the defendants why judgment should not be granted was, that they had a set-off to the plaintiffs' claim in the claim which they, the defendants, were seeking to enforce in the action against the plaintiffs already mentioned, and which was in the Chancery Division.

Under these circumstances the Master in Chambers refused to order judgment to be entered, and subsequently made an order staying all further proceedings in this action until the determination of the action in the Chancery Division, with liberty to the plaintiffs herein to

raise by way of set-off in that action their claim in this action.

O'CONNOR, J., sitting in Chambers, set aside the order of the Master as to consolidation, and the defendants now appealed to the Common Pleas Divisional Court.

Moss, Q. C., for the appeal.

Osler, Q. C., contra.

THE COURT reversed the order of O'Connor, J., and restored that of the Master, holding that the claim in this action should have been made part of the plaintiffs' claim in their first action, and that it was a proper exercise of discretion to leave it to be tried with the claim to which it should originally have been joined.

THE SARNIA AGRICULTURAL IMPLEMENT MANUFACTURING
COMPANY v. PERDUE.

*Changing venue—Judge in Chambers—Judge at Assizes—Divisional Court
—Convenience—Costs—O. J. A., Rule 254.*

Mr. WINCHESTER, Official Referee, sitting for the Master in Chambers, refused an application by the defendant to change the place of trial from Sarnia to Stratford, but gave leave to bring on an appeal from his order, or a substantive motion to change the place of trial before ARMOUR, J., at the Sarnia Assizes.

ARMOUR, J., entertained the motion, which was made according to the leave given, and made the order changing the venue to Stratford. The order was drawn up as made by a Judge at the Assizes, and was signed by the Local Registrar at Sarnia.

Held, that, having regard to Rule 254, O. J. A., and to the leave given and the character of the motion, the order of ARMOUR, J., was to be regarded as that of a Judge and not of the High Court, and could therefore be reviewed by the Divisional Court.

There is nothing to prevent a Judge sitting at the Assizes hearing a Chambers motion, if he is disposed for the purpose to treat the Court room as his Chambers,

Such an application, as this however, should not be made at the trial on account of the inconvenience and detriment to the public interest arising from the delay of other business appropriate to the Assizes, and on account of the injustice to parties to the cause who have prepared for trial; and it is too late when the Assizes have begun to consider the question of the balance of convenience; and therefore, while the Court did not see fit under the circumstances to restore the venue to Sarnia, they varied the order of ARMOUR, J., by making the costs of the day at Sarnia, and of the several motions to change the venue costs to the plaintiff in any event.

[January 2, 1886.—*The Common Pleas Division.*]

THE plaintiffs, pursuant to notice of motion, appealed from an order or judgment of Armour, J., made at the last Sarnia Assizes, changing the place of trial selected by the plaintiffs from Sarnia to Stratford. An application had been previously made to John Winchester Esq., Official Referee, sitting for the Master in Chambers at Toronto, who, on the 6th day of October, 1885, made an order dismissing the application, with costs to be costs in the cause to the plaintiffs, and "with leave to defendant to serve short notice of motion returnable before Judge Armour at the Sarnia Assizes by way of appeal from the said order, or by way of substantive motion to change the place of trial." Pursuant to the said leave the defendant gave

notice "that a motion would be made before the presiding Judge at the Assizes to be holden at the town of Sarnia on the eighth day of October, A.D. 1885, at the opening of the said Assizes on said day, or as soon thereafter as counsel can be heard, by way of appeal from the order pronounced by the Master in Chambers in this action on the sixth day of October, 1885, dismissing the application of the defendant for a change of venue herein from Sarnia to Goderich, and for an order to change the venue herein from Sarnia to Goderich, or for an order postponing the trial of this action until the next Assizes." The motion was based on the material used in Chambers, and upon three additional affidavits made respectively by W. W. Farran, the defendant, and A. H. Manning, partner of the firm of defendant's solicitors, and came on to be heard before Armour, J., pursuant to the above mentioned notice of motion, on the said eighth day of October, 1885; whereupon the learned Judge gave judgment changing the place of trial to Stratford, and an order in the following form was drawn up:

"IN THE HIGH COURT OF JUSTICE.

Common Pleas Division.

"Before the Honorable Mr. Justice Armour, at the Sittings of Assize and Nisi Prius in and for the County of Lambton, at the Town of Sarnia.

"Thursday the eighth day of October, 1885.

"Between THE SARNIA AGRICULTURAL IMPLEMENT MANUFACTURING COMPANY, Plaintiffs, and PETER PERDUE, Defendant.

"Upon the application of the defendant, and upon reading the order made herein by John Winchester, Esquire, Official Referee, sitting for the Master in Chambers at Osgoode Hall, Toronto, on Tuesday the sixth day of October instant, and the defendant now moving by way of appeal from the said order of the said Official Referee, and also by way of substantive motion to change the venue and place of trial of this action from the County of Lambton and Town of Sarnia to the County of Huron and Town of Goderich; upon reading the different affidavits and papers filed by both parties on the said application to change the place of trial and venue in this action, made as aforesaid before the said Official Referee, and upon further reading the additional affidavits of the defendant, and of Alonzo Hodges Manning, and of William W. Farran, filed herein; and hearing both parties by counsel,

"It is ordered that the place of trial and venue in this action be changed from the said Town of Sarnia and County of Lambton, and the

plaintiffs thereupon applying that such place of trial and venue be changed to the City of Stratford and County of Perth or to the City of London and County of Middlesex, it is ordered that the place of trial and venue in this action be changed to the said City of Stratford and County of Perth. Costs of this application and of preparation for trial at the present Sarnia Assizes to be costs in the cause.

“Signed. W. R. GEMMELL,
Local Registrar.”

On the 25th day of November, 1885, *W. H. P. Clement*, supported the appeal, contending that the matter was *coram non judice* at Sarnia, as the only appeal from the Master in Chambers, is to a Judge in Chambers, which means to a Judge sitting in Chambers at Osgoode Hall, Toronto, and not to a Judge sitting at a sitting of the High Court of Justice for the trial of causes. On the merits he contended the Referee's order was right, and ought not to have been set aside. There was not such a balance of convenience in favor of a trial elsewhere out of Sarnia as to justify depriving the plaintiff of his right to select the place of trial, and the Referee's decision made it *res judicata*.

Aylesworth shewed cause, and objected that the Divisional Court had no jurisdiction to review by way of appeal the decision of a Judge sitting in Court: that the appeal, if it will lie at all, must be to the Court of Appeal, and the order in the present instance is, in form as well as substance, an order of the Court and not of a Judge in Chambers: and on the question of convenience, the balance was largely in favor of Goderich, and therefore the decision of the learned Judge was right. There were additional affidavits before him to what there had been in Chambers.

CAMERON, C. J.—Mr. Clement's objection that the Judge sitting in Court for the trial of causes is not a Judge in Chambers, seems to be covered and answered by the decision of the Court of Appeal in *Hartmont v. Foster*, 8 Q. B. D. 82,—Brett, L. J., there says, at p. 84: “A Judge sitting in chambers does not mean that he is sitting in any particular room, but that he is not sitting in open

Court." Then as a Judge in Chambers may sit anywhere, his sitting in open Court does not prevent him if disposed to hear a Chamber motion from doing so, and so an appeal from the Master in Chambers might well be heard by a Judge sitting at a Court for the trial of causes, if he was disposed for the purpose to treat the Court room as his Chambers. This objection of Mr. Clement therefore fails. Then as to the jurisdiction of the Divisional Court to review the decision of a Judge hearing an appeal from the Master ; there is no question the jurisdiction exists if the Judge is to be regarded as sitting in Chambers, as such appeals are by section 36 of the Judicature Act to be to the Divisional Court, which may set aside or discharge any order of a Judge, except orders made in the exercise of such discretion as by law belongs to him. Also by Rule 254, as we had recently to consider in the case of *Bull v. The N. B., &c. Co.*, 11 P. R. 83, any order made by a Judge as to the place of trial, may be discharged or varied by a Divisional Court. Having regard to the notice of motion and the leave given by the learned Referee in Chambers to make the motion, I am of opinion the decision appealed from must be regarded as that of a Judge, and not of the High Court, and so it is within the jurisdiction of the Divisional Court to review. Then upon the merits of the application to change the venue, in the view I take of the proper order to be made on this motion, it is not necessary to express an opinion. In the material before the Master in Chambers and before the learned Judge, it may be said there was sufficient to justify the exercise of discretion either way : and where that is the case the right of the plaintiff to select his place of trial ought not to be interfered with ; but this was not such an application as should be made at the trial. It would be most inconvenient and against the public interest to entertain such motions to the delay of other business appropriate to the Court, and unjust to the plaintiff who has made preparation and incurred expense for such trial, and it is then too late to allow the question of the balance of con-

venience, which may well be considered at the proper time and on proper application, to have any weight. The expenses incurred in such preparation would generally exceed those incurred in retaining the cause for trial at the place originally settled by the plaintiff beyond what would be incurred if the case were tried at the place claimed by the applicant to be most convenient. Notwithstanding this, as these costs and expenses cannot now be saved, and there is room to think a fairer trial for all parties may be obtained at Stratford than in Sarnia, the head-quarters of the plaintiffs' works, no beneficial result could be obtained by setting aside the learned Judge's order. However, as the plaintiffs have been put to additional and needless expense, by no fault of their own, by the defendant's application, the defendant ought not in any event to get the costs of the day at the Sarnia Assizes or of the several motions to change the venue, even if he should be ultimately successful. The order of the learned Judge, which gives him these costs if successful, must therefore be varied so as to make these costs costs to the plaintiff in any event of the action, and the costs of the present motion will also be costs in the cause to the plaintiffs.

GALT and ROSE, JJ., concurred.

Order accordingly.

IRWIN V. SPERRY.

Cross-actions—Equitable claim—Damages—Trial—Jury—Issue.

I. brought this action against S. in the Chancery Division claiming (1) foreclosure of certain mortgages, (2) upon an open account, (3) damages for breach of a contract; and S. sued I. in the Queen's Bench Division for damages arising out of the same contract, with which also I.'s other claims were connected. On a motion to strike out a jury notice, S. offered to let I. have judgment upon the mortgages and the open account, with a reference as to the amounts, subject to a defence which he raised as to a contract by I. to purchase the property covered by the mortgages. BOYD, C., directed (1) the trial of an issue, at a sittings of the Chancery Division, as to the defence raised by S.; (2) that the claim for damages in this action should be tried by a jury at the same time and place as the cross-action; and (3) that I. should have judgment upon the mortgages and open account, with a reference, which was to be stayed pending the trial of the issue directed.

[October 26, 1885.—*Boyd, C.*]

THIS was an action in the Chancery Division brought to enforce three claims, viz., (1) for foreclosure of three mortgages; (2) upon an open account; (3) damages for breach of a contract to manufacture shingles for the plaintiff. There was also a cross action in the Queen's Bench Division between the same parties, in which Sperry claimed damages under the same contract, because the material with which Irwin furnished him to make the shingles was bad, and because Irwin had failed to supply the quantity of material agreed upon. All the matters in question in the two actions arose out of an agreement between Irwin and Sperry, under which Sperry was to erect a mill at Haliburton, and there to manufacture shingles for Irwin for a specified period, the material to be supplied by Irwin, and at the expiration of the period Irwin was to purchase the mill from Sperry at its actual value, or, if that could not be agreed upon, at a valuation to be fixed by arbitration. Sperry built the mill and carried on the manufactures to some extent, and during the period fixed obtained advances from Irwin, for part of which he gave the mortgages in question. The open account in question related to the portion of such advances not covered by the mortgages. In his statement of defence in this action, Sperry set up as

an answer to the claim for foreclosure of the mortgages the clause in the agreement under which the plaintiff was bound to purchase the mill, and also his claim for damages before mentioned.

Sperry served a jury notice in this action, which the plaintiff moved to strike out. The Master in Chambers referred the application to a Judge.

W. H. Lockhart Gordon, for the motion. The claim for foreclosure is one within the exclusive jurisdiction of the old Court of Chancery, and it must be tried according to the practice of that Court : *Pawson v. The Merchants' Bank*, 11 P. R. 72. The mortgages and the debt on the open account arose out of the contract under which the plaintiff is claiming damages, and the three are so connected that they must be tried together.

Watson, contra, offered to allow the plaintiff to have judgment on his mortgages and open account, with a reference to the master as to the amount, and contended that as the only question then left would be as to the effect of the contract to purchase as a defence to the foreclosure claim, and the damages, these should be tried with a jury at the same time and place as the cross action.

BOYD, C., made an order directing (1) that the plaintiff should have judgment upon the mortgages and open account, with a reference as to the amount. (2) That if the defendant wished to raise the question as to the contract to purchase the mill, an issue should be prepared and sent for trial at the Chancery Division Sittings at Peterborough, and that the reference should be stayed till after the trial of this question upon which the claim upon the mortgages depended ; and (3) That the plaintiff's claim for damages should be tried before a jury at the same time and place as the defendant's claim for damages in the cross-action.

YEMEN V. JOHNSTON.

Fund in Court—Assignment—Solicitors' lien—Priorities.

An assignment was made by the mortgagor to a creditor of a portion of a fund in Court, as to which litigation was pending between mortgagor and mortgagee as to their respective shares.

Held, that to the extent to which the solicitors of the mortgagor incurred costs in resisting and prevailing against the accounts brought in on behalf of the mortgagee to that extent their lien should precede the assignment.

[December 15, 1884.—*Boyd*, C.]

THIS was an action by a mortgagee for a sale of mortgaged premises.

The defendant, being pressed by one Johnston, an execution creditor, under the advice of his solicitors tendered the execution creditor an assignment of sufficient of the expected surplus after the sale, over and above the plaintiff's claim, to satisfy his execution.

The assignment was accepted, a stop order obtained, and on the strength of this security the execution was withdrawn. Subsequently the plaintiff filed his accounts in the Master's office, claiming a large sum over and above the amount realized on the sale. The defendant's solicitors contested this claim at considerable expense, and succeeded in surcharging the amount allowed by the plaintiff for occupation rent, and in disallowing large sums claimed for improvements, so that his claim was reduced by about \$1,000, leaving a surplus of \$244.

The defendant's solicitors claimed a lien on this sum for their costs of contesting the account, and to be paid in priority to the assignee.

Shepley, for the solicitors.

Holman, for the assignee.

BOYD, C.—At the instance of the mortgagor's solicitors an assignment was procured from the mortgagor of \$152 of the funds in Court, to answer the debt due by him to the creditor Johnston. The funds represent the proceeds

of the sale of land which was subject to the plaintiff's mortgage, and the sale took place under the direction of the Court. When the transfer was made to the creditor it was supposed by all parties that there would be a large surplus in Court payable to the mortgagor, out of which this claim could be satisfied. Subsequently the mortgagee's accounts were taken, and much expense was incurred by the mortgagor in contesting various items of these accounts, and in surcharging the mortgagee with occupation rent, the result of which was that a surplus was produced of \$244. Out of this the creditor Johnston seeks to be paid in priority to the solicitors for the defendant, who claim to have first their costs of litigating the plaintiff's accounts deducted out of it. Both cannot be paid in full out of this surplus. There is no merit in, or foundation for, any of the grounds of fact alleged for resisting the solicitors' claim. The main difficulty is, that the fund in question was not so much recovered for, as preserved to, the mortgagor, and that for this reason the solicitors have no legal or equitable right to any lien whatever. This reason does not certainly apply to so much of the contest as related to the occupation rent. In that the mortgagor was the actor, and what was charged against the mortgagee in possession was positively recovered by the solicitors. But the claim of the solicitors need not be rested on so narrow and formal a ground. The fund is in the possession of the Court and will be dealt with equitably *ex æquo et bono*. The very fact that an assignment was made of a portion of a fund in Court as to which litigation was pending as to the shares of the parties entitled, and which, therefore, involved the incurring of costs before the amount could be apportioned between mortgagor and mortgagee, imposed upon the creditor the necessity of submitting to all just and proper deductions for the charges of the solicitors by whose exertions the portion of the fund payable to the mortgagor was ascertained. To the extent to which the solicitors of the mortgagor incurred costs in resisting and prevailing against the accounts brought in on behalf of the mortgagee, to that extent their

lien should precede the assignment to the mortgagor's creditor. Such costs are in the nature of salvage money, and are always entitled to meritorious consideration: *Grey v. Mathews*, 3 Ir. Eq. R. 530. In *Birch v. Oldis*, Glasse. R. at p. 352, the Master of the Rolls said: "The solicitor by whose exertions a fund has been realized or protected, has a right to be paid out of the fund which has been benefited by his industry."

It will be referred to the proper officer to tax these costs of the solicitor, and of this application, and the taxation, and the amount so ascertained will be paid first out of the fund in Court and the residue to the creditor. If the parties agree on the amount, there need be no taxation.

FOSTER V. ALLISON.

Master's Office—Admissions—Memorandum in writing.

Admissions made before the Master in the course of a reference should be put into writing and signed by the party making the same.

[November 11, 1885.—*Boyd, C.*]

THIS was an action brought by R. A. Foster against W. H. R. Allison. The plaintiff claimed in his writ an account of what was due the defendant on a certain chattel mortgage and other securities, and to redeem the property covered by the securities; and on March 4th, 1884, it was ordered that it be referred to the Master at Picton to take an account of the amount due, if any, to the defendant as above mentioned, and reserving further directions and costs.

By order in Chambers of March 17th, 1885, the reference was changed to the Master at Belleville, who on April 21st, 1885, made his report, finding the plaintiff indebted to the

defendant to the amount of \$2,365.25 in respect of the said securities.

The plaintiff appealed from the report in respect of a variety of items in the account as taken by the Master, in respect to some of which it was alleged on one side and denied on the other that their correctness had been admitted before the Master.

The appeal was argued on the 6th and 7th of November, 1885, before Boyd, C.

W. A. Foster, for the appeal.

Moss, Q. C., and *Hoyles*, contra.

In the course of his judgment the Chancellor observed as follows : (a)

BOYD, C.—I have had trouble in one or two appeals lately upon this very point, viz., that such and such things were admitted before the Master. As in the case of admissions between solicitors, it would save immense trouble and expense if the matter agreed upon was put into writing and signed. Such, indeed, was the wisdom of our ancestors, for in an order of 1696 (Bea. O. 304) it was thus provided : “Where, upon reference, any matter of fact shall be admitted or agreed to before the Master he shall take memorandum of the fact so admitted and agreed to in his book of minutes ; and the party so admitting or agreeing, shall subscribe such minutes or memorandum in the presence of the Master ; which subscription shall be binding and conclusive to the party on whose behalf the same was so subscribed, so as that the other side shall not be put to any further proof to make good the same.”

(a) The case does not require reporting except on this one point.—*Rep.*

STARK V. FISHER.

Costs—Taxation—Appeal—Local officer—Time—Rule 427, O. J. A.

Appeals from taxation by local officers must be brought on within eight days from the date of the taxing officer's certificate.

[January 11, 1885.—*Boyd, C.*]

AN appeal by the defendant from the taxation by the Local Registrar at Walkerton of the plaintiff's costs of the action.

Holman, for the appeal.

*Hoyle*s, contra, objected that the appeal was too late, not having been brought on within eight days from the date of the taxing officer's certificate.

BOYD, C.—Held that appeals from taxation by local officers should, by analogy to appeals from orders, be governed by the provisions of Rule 427, O. J. A., and that this appeal should therefore have been brought on within the eight days.

Appeal struck out, with costs.

CRANE V. CRAIG.

Infants' allowance—Past maintenance—Encroaching on principal.

Where an allowance for past maintenance of infants is sought out of the infants' estate, it is a rule that the principal is not to be encroached upon, unless for unavoidable reasons falling little short of necessity; and the Court will not sanction a higher allowance for past expenditure than would have been awarded for maintenance if a prior application had been made therefor.

Where the aggregate amount of principal of the estate of five infants was \$11,250, the Master allowed their mother \$9,504 for five years' past maintenance, but *Boyd, C.*, on appeal reduced the amount to \$6,600.

[January 7, 1886.—*Boyd, C.*]

AN appeal by the official guardian on behalf of certain infants from the report of the Master in Ordinary, allowing the mother of the infants a sum of \$9,504 out of their estate for past maintenance.

J. Hoskin, Q.C., for the appeal.

George Morphy, contra.

BOYD, C.—It is a delicate matter to interfere between mother and children when she has expended money in their behalf and seeks compensation out of their estate, while yet they are minors. I do not doubt that the parent has acted for their best interests, but the Court has to be guided by principles which apply to all cases where an allowance for past maintenance is sought. It is a primary rule that the principal of the infants' estate is not to be encroached upon, unless for unavoidable reasons falling little short of necessity: *Walker v. Wetherell*, 6 Ves. 472; *Ex p. McKey*, 1 Ba. & Be. 405. And another principle is, that the Court will not sanction a higher allowance for past expenditure than would have been awarded for maintenance if a prior application had been made therefor. Here the mother expends money to the extent of \$9,504 for maintaining her five children for five years and a half before any application is made to the Court. The Master while allowing all this amount to be reimbursed from the

infants' estate, which averages at the rate of \$1,728 a year, does not direct any larger sums for future maintenance than \$1,000 for the year 1885 and \$900 for the three following years, when the eldest child will attain majority.

The father was a merchant who died intestate in May, 1879, leaving five children then aged respectively three, four, six, nine, and twelve years, and personal property alone, of which the infants' share would aggregate \$11,250. The mother appears to have continued to live in much the same style as before the father's death, and during these five years employed a resident governess at an expense of some \$400 a year. Musical tuition was also obtained at a further charge of \$48 per year. The yearly outlay for clothing was at the rate of \$500. Not questioning the propriety of these things if they could be defrayed out of the yearly income of the infants' estate, I think the Court should, in the interest of the infants, proceed upon the basis of a more economic expenditure when the capital has to be reduced. Having regard to what the Master has allowed for subsequent years, I should say that the average allowance for the past should be at the rate of \$1,200 a year for the infant family. All that can be properly denominated necessities for the infants, considering their station in life, financial and other circumstances, could have been supplied at this yearly outlay in some such way as follows :

For board, &c., at \$12 per month each	\$720
For clothing per year for all	300
For education and incidentals for all	180
<hr/>	
Total	\$1,200

The interest derived from the principal of the infants' estate was at 7 per cent., in all \$787.50 per year, and for the difference between that and the \$1,200 the capital will have to be diminished : *Barlow v. Grant*, 1 Vern. 255, and note ; *Nottley v. Palmer*, 11 Jur. N. S. 968.

The Master may deem it proper to increase to some extent the amount allowed for coming years. If it is needful to make any special expenditure to complete the

education of the eldest girl, that item should be, so far as it exceeds the allotment for the others, charged against her share.

I allow the appeal as to the past and reduce the total allowance to the sum of \$6,600, and refer it to the Master to readjust future allowances, if so advised, on account of this change in the figures. Costs out of the fund.

SMITH ET AL. V. GREY ET AL.

Foreign commission—Evidence—Solicitor—Restricting disclosure.

Held, that the Court in permitting a foreign commission to be opened before the trial, will not impose restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solicitors by such opening.

[December 28, 1885.—*The Master in Chambers.*]

[January 13, 1886.—*Boyd, C.*]

THIS was a motion by the plaintiffs to impose terms upon the defendants as to the use of evidence taken under a foreign commission and returned to the Court. The terms sought were, that the defendants and their solicitors should be restrained from communicating the evidence, or the substance of it, to witnesses whom they proposed to call at the trial.

Arnoldi, for the motion.

H. D. Gamble, contra.

THE MASTER IN CHAMBERS.—I do not think it is proper to make any order in this case as asked.

The commission in question has lately been taken in England, the solicitors for both parties being personally in attendance on behalf of their clients. Mr. Gamble, the

defendants' solicitor, in his affidavit states that he has a full copy of the evidence of the principal witness, and notes of the evidence of the other witnesses, he having conducted the examinations on the part of the defendants. The learned solicitor for the plaintiffs was also present throughout, and is, I have no doubt, also fully informed of the evidence of the witnesses.

Mr. Gamble has explained in his affidavit that the only reason he has for opening the commission is to see how the commission has been returned by the commissioner in a particular which he points out, and not to learn what evidence is given, which he is already aware of.

The solicitors are educated gentlemen and aware of their duties and responsibilities, and this like many another thing must be left to their own feeling of propriety and self-respect, and to their sense of that responsibility to the Court in the conduct of causes which they must always act under.

Other commissions for taking evidence in this cause are about to be executed, on which witnesses for both parties are to be examined, and it would seem as necessary that any order should apply to the plaintiffs and their solicitor, as to the defendants and their solicitor. This does not seem to be contemplated by the motion.

But I do not think an order should be made at all as to either. Were the facts different from what they are, if both were ignorant, as both are here already informed, of the evidence given by the witnesses, I should still think that the proposed order should not be made, for should the commission be opened after it, it might operate to embarrass proper and legitimate consultation in the cause.

There are many professional and moral duties in the conduct of business, the observance of which by solicitors it is not necessary to enforce by an anticipatory order in Chambers.

The plaintiffs appealed, and the appeal was argued by the same counsel.

Boyd, C.—By rules 297, 300, every order for a commission to take evidence abroad is to read as if it contained a clause that office copies of the depositions may be given in evidence on the trial of the action. Upon the return of the commission, the practice is to open it without order in the presence of all parties: *Chalmers v. Pigott*, 1 Ch. Chamb. R. 283. It is then filed and is open to the inspection of all parties, who must have some such opportunity of examining it and of moving against it for any sufficient reason: *Richards v. Hough*, 30 W. R. 676. All parties have then, as of right, liberty to procure office copies of such evidence, and I find no instance of any such condition being imposed as is now asked: *Braithwaite*, R. & W. Prac. 125. I do not think any good purpose can be served by requiring the solicitor for the defendants to undertake that he will not communicate this evidence to any of his witnesses. It is sought to have this imposed as a sort of extension of such secrecy as is obtained by the exclusion of witnesses at the trial. But this exclusion and whatever benefits are derivable from it have been ordered only when and where the examination is going on and the oral testimony is being given. Hall, V. C., refused to exclude witnesses while affidavits were being read to the Court on the ground that this practice obtained only when evidence is being given, not when it is read: *Penniman v. Hill*, 24 W. R. 245. And in the case I referred to during the argument of *Clark v. Gill*, 1 K. & J. 19, Page Wood, V.C., held that an examiner was at liberty to return part of the depositions at a time, though that might have the effect of disclosing the evidence, observing, at p. 20, in language very pertinent to the actual facts of this case: “As the days of keeping evidence secret are now gone by, I do not see the inconvenience of the course proposed; for the solicitors present at the examination might take notes of the evidence, and affidavits might be framed upon such notes.”

The solicitors and parties present at the examination took notes of the evidence and have a copy at length of the testimony of the chief witness, which they have a right

to use in any legitimate way to prepare themselves for the trial. It would seem, therefore, a term not only novel but nugatory to impose any such restriction on the furnishing of office copies as is now sought to be engrafted upon the order for the commission.

The appeal is refused, with costs to the respondents (defendants) in any event.

MILLER ET AL. V. CONFEDERATION LIFE ASSOCIATION.

CONFEDERATION LIFE ASSOCIATION V. MILLER ET AL.

Cross-actions—Staying proceedings—Burden of proof—Consolidation.

On the 4th February, 1885, The Confederation Life Association commenced an action in the Chancery Division to set aside a policy of insurance.

On the 13th May, 1885, *Miller et al.* brought an action to recover the amount of the policy, and on the 23rd May moved to stay proceedings in the former action.

Held, following the rule laid down in *Thomson v. South-Eastern R. W. Co.*, 9 Q. B. D. 320, that there is no hard and fast rule in cases of cross actions, that the one commenced last should be stayed. The court should take the circumstances into consideration, and exercise its discretion as to what is the fairest mode of settling the dispute, and give the conduct of the litigation to the party upon whom the substantial burden of proof rests.

On appeal, ROSE, J., declined to make any order.

Subsequently, on the 27th June, 1885, the defendants in the first action moved for a stay of proceedings in it, and the master made an order accordingly.

On appeal, on October 12th, BOYD, C., declined to interfere at present, as the action of *Miller v. Confederation Life* had been tried and a verdict given for the plaintiffs, but reserved leave to renew the motion if the verdict should be set aside, and varied the order of the master by consolidating the two actions.

[May 23, 1885.—*The Master in Chambers.*]

[June 19, 1885.—*Rose, J.*]

[June 27, 1885.—*The Master in Chambers.*]

[October 12, 1885.—*Boyd, C.*]

THE first named action was upon a life insurance policy and was begun on the 13th May, 1885, in the Queen's Bench Division. On the 4th of February, 1885, the defen-

dants began the second action in the Chancery Division, to set aside the policy.

The defendants now moved to stay proceedings in the first action.

Allan Cassels, for the motion.

Alfred Hoskin, Q. C., contra.

THE MASTER IN CHAMBERS.—This suit was brought this May. The suit in Chancery to set aside the policy of insurance was commenced in February last.

The plaintiffs in this action, it is, who have a claim to enforce. The defendants have no claim whatever, they have merely to defend themselves, by whatever means it may be, against the claim of the plaintiffs. It would seem, therefore, that the present plaintiffs are the proper parties to control the proceedings, in the sense in which the plaintiff has the control of a cause. The defendants would naturally be contented if both suits were stayed for ever. But the plaintiffs have a claim to urge, it would not suit them to have both suits stayed,

Then as the whole claim sought to be enforced is on the part of the plaintiffs, and the whole case of the defendants, whatever form it may take, is a defence against that claim, it does not seem reasonable to turn the plaintiffs into defendants, and to give to the real defendants the control of the legal proceedings. It is not fair, nor in the natural course. It is the reverse of the natural course.

I do not know that I can make any order staying the Chancery suit on this motion. It ought to be done, and the matter of it be pleaded as a defence to this action.

There has been some discussion and uncertainty of opinion among Judges on the proper grounds of decision, as to the party who should be plaintiff where a motion is to stay one of two cross-actions.

In *Thomson v. The South Eastern R. W. Co.*, 9 Q. B. D. 320, this came before the Court of Appeal. In that case the judgment of the Queen's Bench was reversed, and the

Court of Appeal lays down a rule of decision. Brett, L.J. says, (p. 327) "I therefore think that there is no hard and fast rule, in the case of cross-actions, that the one which was commenced last must be the one to be stayed. I think that the Judge must exercise his discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties: if there is nothing to guide him, but who was the first to issue out the writ, I should say that it would be a wise and proper mode of exercising the discretion to give that party the advantage which he has got by his diligence. For instance, if the burden of proof (and I only give this as an instance) is as much on one side as on the other with reference to separate parts of the transaction, then I should think that the person who has issued the first writ would have gained the advantage, and that the action in which he is plaintiff ought to be the action which is to be carried on. But it seems to me, that if all the substantial burden of proof is upon the person who is plaintiff in the action which was begun second, it is not conclusive as to a fair and just mode of trying the dispute between the parties, to stay the action in which he would begin who has the substantial burden of proof as to all the controverted matters. It would be unfair to deprive him of being the plaintiff and so having the right to begin, and it would be hard to make him the defendant, although all the burden of proof lies upon him, and so to give his antagonist the power of anticipating him in matters which, but for the order of the court, he could not do." And Holker, L.J., says (p. 335): "In such a matter as this I cannot be confident, but it seems to me to be reasonable that the party to the litigation who has substantially everything to prove in it, and who would fail substantially unless the necessary evidence were produced, should be allowed to commence the proceedings at the trial, and to have the control of the action."

The above rule seems to shew that the present plaintiffs should be allowed to continue their action. Apart from

technicalities, they are the real plaintiffs throughout this litigation.

The defendants appealed, and the appeal was argued by the same counsel.

ROSE, J.—Without desiring to lay down any general rule, I think on the peculiar facts of this case, I should not interfere.

The proofs of claim were put in on the 4th of February, 1885. On that day the Association issued their writ, and asked the Millers' solicitor to accept service on the same day. He declined, and an order for substitutional service on the same solicitor was made on the 21st of March, and no statement of claim was filed by the Association until the 19th of May, six days after the Millers issued their writ.

The Millers' writ was served on the 14th May, with a statement of claim. The Association account for the delay in a manner satisfactory to themselves, but not so satisfactory to the plaintiff.

The action, being one which was known as a common law action, deprives the Association of any advantage from choosing the Chancery Division.

I think full justice can be done to both parties in the common law division, and so decline to interfere with the master's order.

The defendants in the second action now moved to stay proceedings in it on the ground that another action about the same matter was pending between the same parties.

Alfred Hoskin, Q.C., for the motion.

Allan Cassels, contra.

THE MASTER IN CHAMBERS—In addition to what I said in the former case, where the parties were reversed, I

would say that Miller, for those interested in enforcing the policy, is the proper plaintiff in this litigation between the parties. He it is that is seeking something. All the measures of the company are to resist his obtaining that something. It may be a matter of great importance to a party to be a plaintiff instead of a defendant. He can choose the tribunal, and that may decide the right to a jury, or the right of reply at the trial. It is therefore necessary to consider which of the parties has the right to be a plaintiff, and so have the control of the cause.

A man has a promissory note or any other obligation against another, and there may be the defence of fraud, or accommodation, or want of consideration, or time given to a principal as against a surety, or payment, or almost any defence that can be imagined. The man who is seeking to collect the note or obligation is the proper plaintiff, and not the man who claims to have a defence to it. It would be a strange thing, if the party who entered into the obligation should be looked upon (in a contest as to which of them should be the plaintiff) as the proper plaintiff. No doubt he could sue in the Court of Chancery, stating that he had been defrauded, &c., &c., and asking that the note or obligation should be delivered up to him to be cancelled. In that way he could prevent the party who really had to enforce a claim from choosing his own tribunal, and availing himself of the other advantages which still do exist, of being a plaintiff in litigation instead of a defendant. It might be very knowing and artful in a party substantially a defendant thus to come forward as a plaintiff, but I should think it ought not to be allowed against the remonstrances of the other party. I think a good practical test in such circumstances to discover who should be plaintiff, where there are no cross demands, but really only one subject of litigation, would be to ask, whose object would be defeated supposing both actions to be stayed for ever? The one who in that case would be defeated should be allowed to be the plaintiff, and the other might set up his case as a defence.

Mr. Hoskin has also urged that this matter has been determined on the former motion; and I think that that is so. There are no new facts of any importance in my view.

Proceedings in this cause stayed. Costs of this suit to abide result of the other cause, as also the costs of this motion.

The plaintiffs appealed to a judge in chambers, but before the appeal was heard the action *Miller et al. v. Confederation Life Association*, was tried at the Toronto Assizes before Galt, J., and a jury, and a verdict was given for the plaintiffs.

S. H. Blake, Q.C., for the appeal, cited *National Life Ass. Co. v. Egan*, 20 Gr. 469.

Alfred Hoskin, Q.C., contra, cited *Taylor v. Bradford*, 9 P. R. 350.

BOYD, C.—I think I should have been bound to follow the case cited by Mr. Blake, were it not that the action in the common law division has been tried, and it is now too late to interfere. It would serve no good purpose that there should be a trial of this action also. However, I shall vary the order of the master by consolidating the two actions; and I reserve leave to either party to apply, if a new trial should be directed in the common law action.*

* A motion for a new trial was dismissed by the Queen's Bench Divisional Court on the 8th March, 1886, (11 O. R. 120).

An appeal from the order of Boyd, C., was subsequently argued before the Chancery Divisional Court, and now stands for judgment.

CANADIAN PACIFIC RAILWAY COMPANY V. MANION.

Changing place of trial—Ejectment—Rule 254, O. J. A.—R. S. O., ch. 51, sec. 23.

In an action of ejectment the place of trial may be changed by order of a judge. If the power to change is not given by Rule 254, O. J. A., it is not taken away thereby, and it previously existed under R. S. O., ch. 51, sec. 23.

[February 3, 1886—*Proudfoot, J.*]

[February 20, 1886.—*The Chancery Division.*]

AN appeal by the defendant from the order of the local judge at Pembroke changing the place of trial, upon the plaintiff's own application, from Sault Ste. Marie, the place named in the statement of claim, to Pembroke.

W. H. P. Clement, for the appellant.

Arnoldi, for the respondents.

PROUDFOOT, J.—The local judge has made an order changing the place of trial from the Sault Ste. Marie to Pembroke. The action is an action of ejectment, and the venue is properly laid at the Sault; but it is admitted that every consideration of convenience and expense justifies the change of place of trial to Pembroke. But it is contended that there is no power to make the order.

Marginal rule 254 says, that "there shall be no local venue for the trial of any action except an action of ejectment, but the plaintiff shall in his statement of claim name the county town in which he proposes that the action should be tried, and the action shall, unless a Judge otherwise orders, be tried in the place so named."

If this rule be read as including actions of ejectment, the venue of which is to be local, then such venue may be changed by the order of the judge. If it be read as excluding that action, then there is no provision as to the change of the venue in the judicature act, and recourse must be had to the ejectment act, R. S. O. ch. 51, and by the 23rd section express power is given to change.

Friendly v. Carter, 9 P. R. 41, does not govern such a case as this. It was there held that when there is found in the judicature act a complete set of rules governing any particular part of the proceedings in an action, as proceedings to trial, that the old practice will not be considered to subsist, as to countermand.

But, as I have said, in this instance the rule either expressly gives power to change the venue, or there is no provision at all affecting ejectment.

In either case, therefore, I think the local judge was right, and this appeal must be dismissed. The costs will be costs in the cause to the plaintiffs in any event.

Clement, for the defendant, subsequently appealed to the Chancery Divisional Court.

Arnoldi, contra, was not called upon.

Appeal dismissed, with costs.

ONTARIO BANK V. REVELL.

Interpleader—Sale of goods—Gross proceeds to be paid into court by sheriff.

The gross proceeds of a sale of goods in an interpleader matter should be paid by the sheriff into Court without deducting anything for his expenses.

[February 11, 1886—*The Master in Chambers.*]

On an interpleader application by the sheriff of the county of Victoria an issue was directed to be tried between the claimants and the execution creditors.

The order was drawn up by the sheriff's solicitor with a clause directing that in the event of a sale of the goods seized, the sheriff should pay the proceeds into court, less the expenses thereof and possession money since the date of the seizure.

The claimants objected to this clause being inserted in the order.

A. McDougall and *Holman*, for the claimants.

Leeming, for the execution creditors.

Langton, for the sheriff.

THE MASTER IN CHAMBERS directed that the clause objected to should be struck out, and that the sheriff should be ordered to pay into court the gross proceeds of the sale, for the reason that if the claimant should succeed he would be entitled to the whole proceeds of the sale, without any deduction.

BROWN V. PORTER

KNOX V. PORTER.

Postponing trial—Absence of material witness—Disposition of costs.

The costs of moving to postpone a trial on account of the absence of a material witness, will be costs in the cause, where the party moving has made diligent efforts, &c., to secure the attendance.

[February 16, 1886—*Rose, J.*]

A MOTION was made before ROSE, J., the presiding judge at the Toronto Winter Assizes, 1886, to postpone the trial of these actions upon the ground of the absence of a necessary and material witness. The learned judge made the order for postponement, but reserved the question of costs for further consideration, and subsequently delivered judgment as below.

Watson for plaintiffs.

Lount, Q. C., for defendants.

ROSE, J.—Mr. Lount admitted that he could not successfully contend that the order to postpone the trial should not be made. I have no doubt, on the material before me, that his admission was proper. The only question was, as to the costs.

I reserved my decision to look at the case of *Pattison v. McNab*, 12 Gr. 483. I have also referred to *McMillan v. McDonald*, 22 Gr. 362.

It seems clear that in the Court of Chancery the rule was well established, that where a party had made diligent efforts to secure the attendance of a witness within the jurisdiction of the court, and failed to secure it from a cause which he could not control, then the costs of such an application would be costs in the cause, unless it was possible to take the evidence before a special examiner, or the knowledge of the fact that the attendance could not be secured, came to the applicant in time to enable him to advise the other side so that the witnesses might be notified not to attend.

I think, on the facts before me, the plaintiff was in no default; and that the costs must be costs in the cause. The rule appears to be a just one, and I willingly follow it.

RE BUSHELL V. MOSS.

Prohibition — Division Court — Chattel or fixture — Title to land — Jurisdiction.

The plaintiff sued in a division court for the conversion of a mirror, which the defendant contended was annexed to the freehold and had passed to him therewith. The judge of the Division Court found that the mirror was a chattel and gave judgment for the plaintiff.

Held, [reversing the decision of O'Connor, J., who had directed a writ of prohibition to issue] that, the judge of the Division Court having found as a fact that the mirror was a chattel, his decision should not be interfered with by way of prohibition.

[February 16, 1886.—*The Common Pleas Division.*]

THIS was an appeal by the plaintiff from an order of O'Connor, J., directing a writ of prohibition to issue to J. R. Martin, Esq., the acting judge of the County Court of the county of Haldimand, *ex officio* judge of the 3rd Division Court of that county.

The Division Court judge decided, on evidence adduced before him, that a certain mirror affixed or annexed to a wall of a house was a chattel, and not a fixture, and did not pass under a deed of the land. The defendant disputed his jurisdiction on the ground that the right or title to land and a corporeal hereditament came in question. The Division Court judge thought it was his duty to hear the evidence, and decide whether the mirror was affixed to the land, or was a corporeal hereditament; and found as above in favor of the plaintiff, who claimed the mirror, and awarded him \$50 damages for its conversion.

On motion the defendant's view was upheld, and the order made for a writ of prohibition, from which the plaintiff now appealed.

W. H. P. Clement, for the appeal.

Aylesworth, contra.

ROSE, J.—It would seem that before the judge could rule that the title to land or a corporeal hereditament came in question, he must decide whether the mirror was or was not a chattel. If it was, then *cadit questio*. Having so decided, his decision as to the fact will not be reviewed on a motion for prohibition.

The cases of *Re Brown v. Cocking*, L. R. 3 Q. B. 672, and *Re Elston v. Rose*, L. R. 4 Q. B. 4, clearly state the rules governing the court on such a motion. In the former case Cockburn, C. J., said (p. 675): * * “If the rent be not above £20, the jurisdiction must depend upon the real value, * * whether the judge was right or wrong, he has determined the matter as a question of fact; and as it was incumbent on him to inquire into the matter, and decide, and as he has done so on the evidence before him, we cannot review his decision. An inferior tribunal cannot give itself jurisdiction by deciding without evidence; on the other hand, it cannot refuse to go into evidence in order to ascertain whether it has or has not jurisdiction. * * But when the judge has gone into the inquiry, and has determined the question of fact, this court cannot look to see whether the decision was, on the balance of evidence, right or not.”

In the latter case the court interfered on the ground that the judge of the inferior court gave himself jurisdiction, “by coming to an erroneous conclusion *upon a point of law*.”

It may be noted that the same learned Chief Justice presided when judgment was given in the above cases, and that in the latter case his language as to the want of power in the court to interfere on the evidence, is somewhat less strong than in the former. He said (p. 7), “If there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction, the court will not interfere, *except upon very strong grounds*.”

In the present case, even if the power to interfere exists,

there are no grounds sufficiently strong to warrant our interference with the finding of fact.

The learned judge having found the mirror was not a fixture but a chattel, and therefore did not pass with the land, he had jurisdiction to determine the question of title, and the appeal must be allowed, with costs, setting aside the writ of prohibition, with costs, and directing a writ of procedendo to issue if it be necessary.

CAMERON, C. J., and GALT, J., concurred.

Order accordingly.

TATE V. THE GLOBE PRINTING COMPANY.

Libel—Examination—Rule 285.

In an action for libel against a newspaper, the defendants, on a motion under Rule 285, O. J. A., were allowed to examine (with certain restrictions, the plaintiff before defence filed.)

[February 26, 1886.—*The Master in Chambers.*]

THIS was an action for a newspaper libel, contained in a report of the trial of the plaintiff for the abduction of a girl named Eva Kenny, and an editorial article commenting upon the conduct of the plaintiff.

The defendants before delivering their defence sought to examine the plaintiff, in order to ascertain the facts necessary to enable them to frame their statement. The motion was made under Rule 285, O. J. A.

The facts further appear in the judgment.

Osler, Q.C., for the motion.

A. G. Murray, contra.

THE MASTER IN CHAMBERS.—It has happened that on several occasions, I have felt a good deal the responsibility of deciding upon motions under Rule 285.

The present motion is to examine the plaintiff under that rule, the defendant not having put in his defence. It is upon an affidavit filed by defendants, that it is in their opinion necessary to have the plaintiffs examined upon oath in order to ascertain the facts necessary to enable the defendants to frame their defence.

I should be very sorry to have it supposed that one who slanders another could come here and, as a matter of usual proceeding in a suit for it, get authority, as the first step in his defence, to have a general searching examination of the plaintiff. It would be wild and beyond all judicial discretion to grant such a thing. The mischief and disastrous nature of such a practice is too obvious to require any enforcing. It would afford to some men a gratifying way of carrying on the original wrong.

From the best consideration I can give this case, I think I ought to grant the leave to examine that is here asked as to certain heads of inquiry, and I state my reasons.

The occasion on which the libel was published, a judicial trial, the evidence given on it, and the remarks of the learned judge, the report of all these, which does not seem to have been exaggerated or in any sense misrepresented so as to imply a malicious intent in the observations made by the newspaper, all seem to give countenance to the contention of the defendants that their act was in the performance of a public duty as journalists, and was without malice against the plaintiff.

All this may be consistent with the innocence of the plaintiff of the acts imputed to him, but it shews the real source of the defendants' information, and shews that the defendants may ask in good faith for this examination upon the facts stated in the affidavit filed, and in my opinion it is a legitimate proceeding under the circumstances.

I think the examination should be confined to the conduct of the plaintiff with and towards Eva Kenny—I mean his conduct throughout—and as to the damage which he claims to have sustained, from the publication.

GONEE V. LEITCH.

Cross actions, consolidation of—Venue.

Where cross actions, with different venues, are consolidated, the place of trial will be ordered as the balance of convenience requires.

[March 2, 1886.—*The Master in Chambers.*]

THIS action having been consolidated by order in Chambers with a cross-action, a motion was made to change the place of trial from Toronto, which was the place proposed by the plaintiff in this action, to London, the place proposed by the plaintiff in the cross action. (the defendant.)

W. H. P. Clement, for the motion.

Kappele, contra.

THE MASTER IN CHAMBERS.—This case seems removed from that rule which attributes so much influence to the mere will of the plaintiff as to the place of trial.

This is a consolidated action; the motion is to change the venue from Toronto to London. Of the actions consolidated, the trial of one was laid in London, that of the other in Toronto. At the time of the order for consolidation it was left open to a motion at which of those places the trial should be had, because one of the parties was not at that time prepared to go into the question. It would seem, therefore, that the only question is, which is the more proper place, having a view to the interest of both parties.

Mr. Clement has urged this view, and I think he is right. I think the balance of convenience requires that trial should be at London, and there is no force that I can see to draw the line out of plumb.

The costs will be in the cause.

BALL ET AL. V. CROMPTON CORSET CO.

Costs—Taxation—Tariff—Foreign witness—Rules of T. T. 1856, 154 and 168.

The tariff of costs now in force does not pretend to exhaust all possible items or services for which remuneration is to be made. The object of a tariff is to provide a fixed or movable scale for usual and ordinary services and as to all items embraced therein it is generally conclusive, but for other matters one has to go outside of the tariff to the practice and course of the Court. It is therefore for the taxing officer to determine according to a proper discretion, what allowance to make for procuring the attendance of witnesses who live out of the jurisdiction.—Rules 154 and 168 of T. T., 1856, are still in force as to matters not embraced in the tariff of 1881.

[March 17, 1886.—*Boyd, C.*]

AN appeal by the plaintiffs from the taxation by Mr. Thom, one of the taxing officers at Toronto, of the defendants' costs of the action between party and party. The objection was as to allowances for payments made to one of the witnesses at the trial, the facts in connection with which appear in the judgment.

Akers for the appellants.

Langton for the respondents.

BOYD, C.—The master's taxation is objected to because he has allowed for a foreign witness, who was brought from Buffalo to give evidence as an expert, at the rate of \$33 per day and expenses. The ground of objection is, that there is no power to tax such an item, as it is not provided for by the tariff. The tariff now in force does not pretend to exhaust all possible items or services for which remuneration is to be made. Nor were the earlier tariffs framed for any such purpose. The last like the rest covers all the usual and ordinary services, but is expressed to be only "in respect of the matters thereby provided for." See heading of tariff of September, 1881. The object of a tariff is to provide a fixed or movable scale for such services, and as to all items embraced therein it is generally

conclusive, [but for other matters one has to go outside of the tariff to the practice and course of the Court: *Re Geddes*, 2 Ch. Chamb. R. 447; *Re Emanuel*, 9 Q. B. D. 408.

This tariff does not provide for the payment of the costs of a foreign commission for the taking of evidence, nor did the earlier Canadian tariff in force here; yet the costs of procuring such evidence have been costs in the cause by a long course of practice: *Gordon v. Fuller*, 5 O. S. 174; *Colborne v. Thomas*, 4 Gr. 169. Now the alternative of getting foreign evidence by commission is to procure the personal attendance of the witness who is out of the jurisdiction, which is generally a more satisfactory course, especially in the case of skilled evidence, such as is in question here. The tariff does not refer to witnesses out of the jurisdiction. But it is for the master to determine what allowance to make in such cases, according to a proper discretion, whether as for a commission or in respect of personal attendance. That is expressly held to be the correct practice in *McAlpine v. Coles*, 1 C. & M. 795, and more fully in 2 Dowl. P. C. 299, a case the principle of which was followed by Morrison, J., in *Fox v. Toronto and Nipissing R. W. Co.*, 7 P. R. 157. See also *Loneragan v. Royal Exchange Assurance*, [7 Bing. 729.

It is evident from what took place at the trial, as stated during the argument, that the personal attendance of this witness accomplished what could not have been done by interrogatories at a distance, and the master allowed less than was paid to him. The guiding rule in such cases is thus expressed in *Morgan*, 2nd ed. p. 43, "if a foreign witness who is not accessible by subpoena, but whose evidence is material in the case, refuses to leave his house unless he is remunerated for his trouble, the compensation paid to him, if reasonable in amount, will generally be allowed and taxed against the losing party." This course of practice has long been observed in our courts, and it is preserved, as Mr. Langton pointed out, by rule 455 of the Judicature Act. It can probably be traced back to the English practice as introduced into our system by old

rules of the Common Law Courts, two of which are still in force on such points as this. I refer to rules of Trinity Term, 1856, Nos. 154 and 168. Mr. Holmsted in the 2nd vol. of his Rules and Orders speaks of the latter as superseded by the tariff of 1881, but that comment should be, I think, qualified as to matters not embraced in the tariff.

I dismiss the appeal, with costs.

QUAY V. QUAY.

Taxation—Appeal—Local registrars—Jurisdiction of master in chambers—Certificate—Taxing-officer.

Appeals from the taxation of costs by local registrars are subject to the eight days' limit prescribed as to appeals from orders of masters and local Judges, as was held in *Stark v. Fisher*, ante, p. 235, but the time for appealing may be enlarged by the master in chambers or a judge. It is a convenient practice, when any case is made on appeal from taxation as to several items, or on the ground of general exorbitancy, to refer the whole bill to one of the taxing officers at Toronto, as upon a revision.

[March 10, 1886.—*Boyd, C.*]

THIS was an action for alimony, which was settled before the trial, the defendant (the husband) undertaking to pay the plaintiff's costs as between solicitor and client.

These costs were taxed by the local registrar at Cobourg. The taxation was closed on the 10th February, 1886, and the defendant brought on an appeal therefrom before a judge in chambers on the 22nd February. Proudfoot, J., dismissed the appeal on the ground that it was brought on too late, following the decision of *Boyd, C.*, in *Stark v. Fisher*, ante p. 235, but without prejudice to a fresh appeal in the event of the time for appealing being extended.

On the application of the defendant the master in chambers extended the time for appealing from the taxation, and a fresh appeal was accordingly brought on by the defendant on the 8th of March, 1886.

Holman, for the appellant.

W. H. P. Clement, for the respondent, also appealed from the order of the master in chambers extending the time for appealing. He contended that the master had no jurisdiction to extend the time, but only the officer appealed from or a judge of the High Court.

Both appeals were argued at the same time, and judgment was reserved.

BOYD, C.—The taxation in this case was before a local registrar. By the late Act, 48 Vic. ch. 13, sec. 22, (O.), such an officer has the power to tax costs in actions “subject only to appeal to a judge of the High Court.” Before this act these local officers had power to tax in such cases, subject to a revision as of course in certain cases and as of right, in other cases upon the application of any party interested : Rule 439. This revision was had before one of the taxing officers at Toronto. This process of revision was adopted from the former Chancery practice (G. OO. 310-313), and it provided that proceedings therefor should be taken “forthwith.” I held in some cases before me that the eight days’ limit prescribed by the rules in cases of appeals from other local officers should govern appeals under this statute. I adhere to that as a practically reasonable rule, and have no doubt that any practice based on *Re Ponton*, 15 Gr. 355, is quite inapplicable to a case such as this. That was a taxation of costs between solicitor and client, as to which the procedure relating to reports of masters is strictly pertinent. But in cases of party and party taxations it is better to have some such time-limit as is provided in the case of appeals from other subordinate officers, rather than to leave the matter all at large. As a general principle these applications should be made as soon as possible : *Re Tibbitts*, W. N. 1881, p. 168. If in any particular instance eight days are found to be insufficient, the time may be enlarged by the master in chambers or a judge : Rule 462.

The statute was intended to dispense with the revision of local taxations as of course. Now the party dissatisfied is

to point out his objections before the officer who is taxing, and, failing to get redress, he is to bring them before the judge by way of appeal. I have thought it a convenient practice, when any case is made on appeal as to several items or on the ground of general exorbitancy, to refer the whole bill to one of the taxing officers at Toronto as upon a revision : *Snider v. Snider*, 11 P. R. 140. These officers are specially competent to adjust what is wrong, and their experience may well be utilized in order that the judges may not be burdened with the work of examining in detail objections which sometimes cover pages of foolscap—nearly fourteen pages, I observe, in the present appeal. However, a reference to some of the heads of objections here manifests the necessity of such a general revision. This suit is for alimony, and it is said judgment went by consent, yet nearly \$1,700 of costs are taxed. The fact that some of the items are composed of the lady's travelling expenses in going to visit her solicitor may help to explain the dimensions of the bill. Mr. Justice Chitty's language as to England is in some respects not inapposite to the state of affairs in this province. Referring to the undesirability of decentralizing taxation he says: "The district registrars cannot be expected to possess the skill and experience of the Chancery taxing masters, and a variation of practice might arise which would be very undesirable:" *Re Wilson*, 27 Ch. D. 242, 245.

The result of the applications to me herein is, that I think the master in chambers had the power to extend the time for appealing and rightly exercised it, and that the appeal entered within a month from the taxation is too late. I give no costs, and direct the bill to be referred for revision generally to the taxing master.

MACPHERSON V. TISDALE.

Attaching debts—Unascertained costs—Set-off—Payment into court.

By the judgment in this action the defendant was found to owe the plaintiff \$115, and he was ordered to pay the plaintiff's costs of action, less some interlocutory costs awarded to the defendant. Subsequent to judgment certain creditors of the plaintiff issued garnishment process from a Division Court, attaching all debts due from defendant to plaintiff.

After the taxation of the plaintiff's costs, but before the taxation of the defendant's interlocutory costs, the defendant paid \$115 into the Division Court, having previously paid another sum of \$115 to the sheriff to procure his release from arrest under a *capias* after judgment in this action.

Held, that the costs coming to the plaintiff constituted an attachable debt before taxation, which was bound by the service of the garnishment process, and properly payable into the Division Court after it was ascertained by taxation; and the defendant could not object that his set-off was not ascertained at the time of payment into court, as it was by his own default; and therefore the money paid into court pursuant to the attachment was to be taken to be part of the money due to the plaintiff for costs, and not as representing the same debt as the money paid to the sheriff.

[January 12, 1885.—*Boyd, C.*]

THIS was an appeal by the plaintiff from the order of the master in chambers directing the sheriff of Essex to repay to the defendant the sum of \$115, paid by the defendant to the sheriff under the circumstances set forth in the judgment.

W. H. P. Clement, for the plaintiff.

A. H. Marsh, for the defendant.

BOYD, C.—By judgment of 13th February, 1884, the defendant was found to owe the plaintiff \$115, and he was ordered to pay the plaintiff's costs of action, less some interlocutory costs awarded to the defendant. The plaintiff's costs were afterwards taxed at \$430 and the defendant's costs at \$44.86.

On 4th March, 1884, the defendant was served with garnishment process from the Division Court at the suit of Tisdale and Cooper as primary creditors and the present plaintiff as primary debtor, by which all debts due or

accruing due from the defendant to the plaintiff were attached. The claim of the primary creditor was for \$189, and on 1st August, 1884, the defendant paid \$115 into the Division Court pursuant to the direction of the process served on him.

On 10th July the plaintiff had arrested the defendant on a *capias*, and in order to get his release the defendant paid the amount of the debt, \$115, to the sheriff. The plaintiff's costs of action were taxed before the 8th July, 1884, but the defendant did not avail himself of the opportunity to tax his set-off of costs till after the long vacation.

The master has held that the bail money paid to the sheriff represents the debt which was garnished in the Division Court, and has ordered the return of that sum by the sheriff to the defendant. It is worthy of notice that the solicitor for the plaintiff attended the preliminary garnishment proceedings and claimed a lien on the \$115 paid into the Division Court in respect of his costs in this action, and it is said in one of the affidavits that the judge expressed the opinion that his lien should prevail as against the attaching creditor. When the payment into court was made the plaintiff's costs of action had been taxed, and the whole amount payable to the plaintiff for debt and costs was $\$430 + \$115 = \$545$. The Division Court garnishment was for debts due or accruing due, and the failure or remissness of the defendant to tax his set-off for costs did not render the \$545 any the less an attachable debt due to the plaintiff: *Sparks v. Younge*, 8 Ir C. L. R. 251.

This is putting the case at the highest for the defendant, because it does not lie in his mouth to object that his set-off was not ascertained: as it was his business and duty to have had it ascertained when the other taxation was being prosecuted. Apart from this I have a very strong opinion that these costs coming to the plaintiff did constitute an attachable debt even before any taxation, though it may be that no order to pay could be enforced till after the amount was ascertained. An unadmitted debt though

not liquidated was attached in *Daniel v. McCarthy*, 7 Ir. C. L. R. 261. In *Jones v. Thompson*, E. B. & E. 63, Crompton, J., says: "There must be a debt as much as in bankruptcy," that is, as the context shews, the test is as to what would be a good petitioning creditor's debt in bankruptcy.

Now it is well settled that a solicitor's bill of costs though it has not been signed and delivered under the statute is a legal debt upon which proceedings in bankruptcy may be founded: *Ex p. Sutton*, 11 Ves. 163.

Here, however, the plaintiff's costs had been taxed and execution issued for them, and the debt ascertained before the defendant availed himself of the privilege of paying into the Division Court. When the Division Court process issued there was a debt for costs ascertainable by and payable after taxation, which was bound by the service, and which was properly payable into the Division Court after it was ascertained by taxation: *Tapp v. Jones*, 23 W. R. 694, L. R. 10 Q. B. 591.

It is not needful that the debt to be attached is one for which an action can be brought in order to bring into play the garnishing process. An action cannot be brought for the bill of costs by the Attorneys' Act unless certain preliminaries are observed. There may be a valid defence based on the absence of these statutory prerequisites: *Scane v. Duckett*, 3 O. R. 370. But the claim for costs still remains a debt, the character of which is not changed by the delivery or the taxation of the bill of items. See upon this point the observations of Pigot, C. B., in *Boyse v. Simpson*, 8 Ir. C. L. R. 524-5.

In *Johnson v. Diamond*, 11 Ex. at p. 80, Parke, B., says, as to the attachment of debts: "I agree that if the bond had been conditioned for the payment of a sum certain, or a sum capable of being ascertained without the intervention of a jury, the statute would apply." This same case also affords another test which may be applied and with the same result. Parke, B., says again: "I quite agree that a debt which can be set off is capable of being attached under these clauses."

Now, it is clearly established law that an attorney's bill of costs will be allowed as a set-off and as a debt, though no bill has been delivered: *Brown v. Tibbitts*, 11 C. B. N. S. 855.

For these reasons it cannot be said as a conclusion of law in the present case that the money paid to the sheriff necessarily represented the same debt or sum payable which was garnished and paid into the Division Court. Therefore I cannot see my way to support the order made upon the sheriff for its return to the defendant, and I allow the appeal, with costs, and with costs of the application below to the plaintiff.

REGINA EX REL. FELITZ V. HOWLAND.

*Municipal election—Quo warranto—Master in chambers, jurisdiction of—
Time—Qualification—Married woman—Municipal act, 1883, (O.)*

The jurisdiction of the master in chambers to grant a *quo warranto* summons under the municipal act, 1883, (O.), is established by the 13th sec. of the A. J. Act, 1885.

A summons issued within a month after the formal acceptance of office by taking the statutory declarations of qualification and office is in time, notwithstanding that it issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent at a meeting of electors, and certain other acts of a similar character, less formal than the statutory declarations.

The respondent was rated on the assessment roll in respect of a leasehold property, sufficient in value to qualify him for office, but the property of his wife, to whom he was married in 1872, and who acquired the property in 1884.

Held, that the respondent had no estate or interest in the property, and therefore was not qualified for office under sec. 73 of the municipal act, 1883, (O.)

[March 23, 1886.—*The Master in Chambers.*]

THE respondent was elected mayor of the city of Toronto on the 4th of January, 1886. He made the customary declarations of qualification and office on the 18th of January, 1886.

On the 18th of February, 1886, *Kappele*, for the relator, moved before the master in chambers for a *fiat* for the issue of a summons in the nature of a writ of *quo warranto* to contest the validity of the election of the respondent as mayor of Toronto on the ground of want of the property qualification required by sec. 73 of the municipal act of 1883, (O). The master gave the *fiat*, the summons was issued and served on the respondent, who appeared thereto, and it came on to be argued before the master on the 20th of March, 1886.

Lash, Q. C., for the respondent, upon a preliminary objection. The master in chambers had no jurisdiction to direct the issue of the summons nor can he hear the case now. Sec. 186 of the municipal act, 1883, gives the jurisdiction to a judge, who is *persona designata*, and from whom there is no appeal: *Norvell v. Canada Southern R. W. Co.*, 9 A. R. 310. This section obviously does not give the master jurisdiction; if there is any jurisdiction it must be under the judicature act. The application for the summons was not in a matter or action in the High Court of Justice: Rule 420, O. J. A. There is no matter in the court till it is brought into court; *Rex v. Jones*, 2 Stra. 704; *Bevan v. Bevan*, 3 T. R. 601; *King v. Cole*, 6 T. R. 640; *Clarke v. Cawthorne*, 7 T. R. 321.

The court itself could not make the order under the terms of sec. 186; *Barnett v. Craw*, 1 Dowl. N. S. 774; *Bentley v. Berrey*, 7 M. & W. 146; *Brown v. Bamford*, 9 M. & W. 42.

The master decided to hear the case subject to the objection.

The facts as to the respondent's qualification were not disputed. The respondent was rated on the assessment roll in respect of a leasehold property in Toronto of more than sufficient value to qualify him under section 73, but at the time of the election this was not his property, but

that of his wife, to whom he was married in October, 1872. The respondent had at one time held the property in his own right, but had transferred it for value to his wife's trustee, who had then transferred it to her. The respondent's declaration of qualification was made with reference to this property and upon it he sought to qualify.

Bain, Q. C., for the relator. The respondent had at the time of the election no estate in this property. His wife had a chattel interest in it, and at common law the husband had no interest in his wife's chattels real other than a right of enjoyment, control, and disposition, which right was expressly taken away by the married women's property act of 1859, and since that act the husband has no estate or interest whatever in his wife's chattels real, at all events where the marriage was subsequent to 1859, as here. If there is any doubt as to the effect of the act of 1859, the second section of the married women's property act, 1884, removes it. The effect of the conveyance to the wife was to make it her separate estate; *Wright v. Garden*, 28 U. C. R. 609, 624; *Lawson v. Laidlaw*, 3 A. R. 77; *Chamberlain v. McDonald*, 14 Gr. 447; *Reg. ex rel. Lachford v. Frizell*, 6 P. R. 12; *Donnelly v. Donnelly*, 9 O. R. 673; *Adams v. Loomis*, 24 Gr. 242.

Kappele, also for the relator, upon the objection to the jurisdiction. Whatever doubt there may be as to the jurisdiction of the master in chambers under rule 420 is set at rest by the language of section 13 of the administration of justice act, 1885, (O.), which greatly extends his jurisdiction.

Robinson, Q.C., for the respondent. The relator did not take out his summons in time. In his affidavit the respondent says that he was elected on the 4th of January last and that on the evening of that day he stated at a public meeting that he would fulfil the duties of the position to the best of his ability, and on subsequent occasions previous to taking the oath of office he signified his acceptance and performed certain of the duties of mayor. Now, the

question is, whether the relator came here in time? He must come within one month from the acceptance of office. If he did not accept office until he took the oath, then he is in time; if other words or acts are sufficient then he may be too late. In *Regina ex rel. Clancy v. McIntosh*, 46 U. C. R. 98, a decision of the Queen's Bench Division, at p. 104, Cameron, J., said that there could be no acceptance of the office until the taking of the oath, but Chief Justice Draper in *Regina ex rel. Linton v. Jackson*, 2 Ch. Chamb. R. 18, expressed an entirely different view. Surely the acceptance on the 4th January, with the subsequent entering on the duties of mayor before taking the declaration, constituted a sufficient acceptance of office. Test it in this way, suppose there was a question of electing the mayor to another position, incompatible with that of mayor, before he took the declaration, would it not be said under the circumstances of this case, that he had already accepted the office of mayor? Suppose a question arose in an action whether Mr. Howland was mayor, if it was shewn that he performed the duties of mayor, there would be a *prima facie* case; would it be displaced by shewing that he had not then taken the declaration of office? Now, as to the main question of qualification. A great deal of what was argued on behalf of the relator is indisputable, but we must look to see what is the true meaning of the clause respecting qualification in the municipal act. The words are:—"Such persons as have in right of their wives a legal or equitable freehold or leasehold." These words according to my learned friend's argument were re-enacted in the municipal act at a time when they had ceased to have any meaning, except in a few cases, by reason of the changes in the law as to the property of married women. In the *Prescott Case*, 1 H. E. C. 1, the words "in right of the wife" have received a construction; they are taken to mean the right of representation by the husband of the wife. It is not necessary that the mayor should have an estate; it is sufficient that he should be the husband of a wife who has an estate. In

the *Prescott Case*, Chief Justice Richards does not say that the husband owns the wife's estate; but that for certain purposes he is proprietor in right of his wife. We have that plain case shewing that "proprietor in right of his wife" means, not that he must be proprietor, but that his wife must be proprietor, and we have the plain rule of law, that when the words of a statute have been interpreted by a court in a particular way, and are re-enacted, they must be taken to be enacted with the same meaning that the court has given to them. It is contrary to the general intention of the election law that the property should be unrepresented, the married woman property holder cannot be elected to office or vote, and it is a reasonable inference that her husband can.

Lash, Q.C., on the same side. The words "in right of his wife" can have no meaning at all unless they mean representation by the husband. If the husband is to have an estate in his wife's property, that is not an estate in his wife's right, but in his own, and the statute has already said that he can qualify on property had in his own right. The statute is not dealing with the estate which a husband might have at common law, but with a right of representation. Now as to the question of jurisdiction. If the master in chambers has jurisdiction it is under the judicature act. The same rule which gives the master jurisdiction gives an appeal from him to a judge in Chambers, and other rules give an appeal from the latter to the court. But there is no appeal from the *persona designata* in the municipal act, so how can it include the master? The statute says that the decision of the judge who tries the case shall be final, and a judge of the High Court is intended and not the master in chambers.

Bain, in reply. The whole question as to the time for moving against the election is concluded by *Regina ex rel. Clancy v. McIntosh*, which is distinctly in our favour. I also refer to *Regina v. Boyle*, 4 P. R. 256, where it was held that an alderman could not act as a justice of the peace until he had taken the oath as alder-

man. The decision of Draper, C. J., in *Regina ex rel. Linton v. Jackson*, was in Chambers, and was overruled by the full court in *Regina ex rel. Clancy v. McIntosh*.

THE MASTER IN CHAMBERS.—As to the objection taken to the jurisdiction of the master in chambers to grant the writ in this case, it is enough to say, without further noticing the argument that has been addressed to me on this point, that the 13th section of the administration of justice act, 1885, puts an end to any question on the subject. There is jurisdiction.

It is then objected that the writ was not taken out in time. It was applied for more than six weeks after the election, but within a month after the statutory declaration of qualification and office.

The respondent in his affidavit states several matters which, it is contended for him, shew an acceptance by him earlier than that formal declaration by the respondent:

1st. That on the day of the election, after the election, at a public meeting (no doubt a public meeting of the electors is meant,) he stated to the meeting that having been elected he would fulfil the duties of the position to the best of his ability.

2nd. That on the 11th January following he received, as mayor elect, a communication from the city clerk, requesting the respondent to send a draft of the declaration and qualification required by the statute, and that on the 14th January he sent the draft to the clerk.

3rd. That on the 16th January he attended at the city hall at the request of the clerk, who was the returning officer at the election, after the late mayor had finally quitted his office, and was by the clerk introduced as mayor of the city to the officials in the employ of the corporation, whom respondent then addressed in his capacity as mayor, assuring them of his support in their performance of their various duties.

4th. That on the 8th January he wrote as mayor to the city solicitor, requesting him to obtain legislation on points

affecting the government of the city, and in the same week the legislative committee of the city dealt with and adopted in the main his recommendations.

As to all this the relator's learned counsel contends that none of these acts nor the whole of them together shew the acceptance of office which the statute contemplates. That what the statute does contemplate as acceptance is an open, public, and notorious act, putting the acceptance beyond dispute or cavil—not a something done in secret, so far as the public is concerned, which upon inquiry and explanation, might leave the fact of acceptance in great doubt. He further cited the case I mention below.

Upon reason and upon authority, I think the contention of the relator on this point is right. The very point came up in *Regina ex rel. Clancy v. McIntosh*, 46 U. C. R. 98, where it was decided unanimously by the Queen's Bench, that the acceptance meant by the statute is a formal acceptance by the statutory declaration of qualification and office, and not a mere verbal acceptance by speech to the electors, or such like.

I think, therefore, that the relator was within the time for taking his proceedings.

This brings the case down to the relator's objection to the property qualification of the respondent. It is upon a leasehold for years, of very ample value, if it could be a qualification at all, the property of the respondent's wife. This leasehold had been the property of the respondent since the year 1872, and the respondent has lived since that date and now lives upon the property which is the subject of the lease, for which he has been all that time and is now assessed. In 1884, however, he conveyed his estate in the property, for a valuable consideration, to the trustee of the respondent's wife, who then conveyed the same to the respondent's wife, who in and since 1884 has been and now is the holder of the estate in full property.

Can this leasehold estate so held be a property qualification for the respondent? This is, of course, purely a question of law. See sections 73, 74, 272, and 273 of the municipal act of 1883.

The officer must have to his own use and benefit in his own right, or in right of his wife, as proprietor or tenant, an estate, legal or equitable, freehold or leasehold, to a certain specified amount.

This enactment as to property held in right of the wife has come down from a state of the law which was radically different from the present law as to the property of married women. Cases, however, may yet arise where that provision will be important.

But as respects this case and the alleged qualification of the respondent, it is plain that he has no estate or interest whatever in the leasehold property specified. It is the property of Mrs. Howland, in which the respondent has no estate or interest whatever, and over which he has no control, and therefore I must find, whatever may be the respondent's stake in the city, that he has legally no property qualification for the office of mayor.

RE FLEMING.

Executor—Compensation—Mode of fixing commission—Division between executors—R. S. O. ch. 197, sec. 36-40—Costs as between solicitor and client out of estate—Practice—Adjournment from chambers into court—Proper time to apply—G. O. 642—O. J. A. 1881, R. 428.

C. M. died in May, 1884, having by his will made W. M. sole legatee and devisee of all his property excepting an annuity of \$400, payable to his widow, and he appointed F. and W. M. his executors. F. had presented this petition claiming compensation as such executor. The evidence showed the estate to have consisted of about \$115,000, of which \$32,000 was money, and the rest debentures and stocks of various descriptions, a great many being payable to bearer; also, that what little actual work F. had done, consisted of acts done for conformity at the bidding of the private solicitor of W. M., excepting that he successfully exerted himself to procure an additional sum for the widow from W. M., who himself did practically nothing.

Held, that the petitioner should be allowed, as compensation, a commission of three and a half per cent upon the whole of the estate, and in fixing that sum the work done by F. in connection with procuring the increased sum for the widow was to be considered.

Our courts have adopted a commission as a means, in ordinary cases, of ascertaining or measuring the compensation of trustees and executors under R. S. O. ch. 107, and the usual commission allowed is five per cent upon the amount of the estate got in and properly paid over, and in ordinary cases this commission is allowed on the determination of the trust, and looking at the relative amount of work done by F. in this case, compared to that done by W. M., F. was entitled to one per cent more than the half of the five per cent commission.

Held, also, that in this case the costs of the petitioner must be paid as between solicitor and client out of the estate, including his costs of the appeal and cross-appeal from the report of the master in ordinary.

Where, after the argument in chambers of an appeal from the master's report, counsel for one of the parties asked that the appeal might be treated as though argued in court, and any order made there on issue as a court order; or, at all events, that costs should be allowed as of a court motion.

Held, that although the appeal would, on account of its nature, have been adjourned into court, if such adjournment had been asked before the argument of it, the present application was too late, and the court had no power to grant it.

[February 16, 1886.—*Ferguson, J.*]

THESE were appeals from the report of the master in ordinary on a reference made to him to fix a fair and reasonable allowance for the care, pains, and trouble and time expended by one Fleming, (who had obtained an order directing the said reference on petition) as one of the executors of Charles Magrath, deceased.

The order directing the reference also directed that the

costs of and incidental thereto should be paid by and to whom, and in such manner as the Master should direct.

Oral evidence was taken before the Master, the general effect of which, with the other facts of the case sufficiently appear from the judgment. It may be added, however, that it appeared that the testator died in May, 1884, and that it was about a year before the affairs of the estate were finally arranged. By his will and codicil thereto the testator required his executors to pay to his wife for life the yearly sum of £100 out of a property on Yonge street, Toronto, in lieu of all claims for dower, and he commended her to the care of his brother William Magrath, and desired that notwithstanding the bequest to her, he should "see that she did not want for all reasonable maintenance and comforts becoming her station in life. The residue, comprising about the whole of the estate, was given to William Magrath. This petition was presented on October 12th, 1885.

The evidence of the work actually done by the petitioner as executor, was vague, owing to the fact that he had kept no day book or account of what he had done from day to day, and evidence was given on behalf of the co-executor, William Magrath, to show that, except in respect of what was spoken of as the "precatory trust," the actual work in connection with the estate had been done almost entirely by one Robertson, the private solicitor of William Magrath, the petitioner joining in such formal acts as were required of him, but exercising little private discretion, as he said he relied entirely on the said Robertson. The petitioner stated that he was unable to compute how much of his time had been actually taken up in the work of the estate, but that it had taken "considerable time, put altogether, and it would exceed two weeks."

These appeals were by the petitioner and W. Magrath respectively, the former complaining that the compensation fixed by the Master was too low, the latter that it was too high, as more fully mentioned in the judgment.

Both appeals came on for argument together before Ferguson, J., in Chambers, on February 8th, 1886.

S. H. Blake, Q. C., and *Lefroy*, for the petitioner, Fleming. The words as to the wife, in the will, may be argued as having imposed a charge in favour of the widow. At any rate a bond was given settling \$600 a year over and above the \$400 on her. Mr. Fleming might no doubt have brought his suit, and had the widow's claim settled, but it would probably have gone to the Supreme Court. Instead of the fact of the work having been done by a solicitor being a reason why an executor or trustee should not receive compensation, the cases show that that is one reason why compensation is allowed, because a trustee or executor is required to do what a prudent man would do, and in employing solicitors or professional agents, trustees are only doing their duty as prudent men. The court does not count the hours employed by executors and trustees, but finds it better in the aggregate of cases that what may seem to some people a large sum should be allowed as compensation, and executors and trustees encouraged to wind up estates as speedily as possible, rather than only such a small sum as might tempt them to drag on the affairs of an estate. In an ordinary normal case five per cent. on the estate received and handed over should be allowed: *Stinson v. Stinson*, 8 P. R. 560; we are only asking what since 1862 has been considered the normal allowance: *Torrance v. Chewett*, 12 Gr. 407; *Re Batt*, *Wright v. White*, 9 P. R. 447; *Chisholm v. Barnard*, 10 Gr. 479; *McLennan v. Heward*, 9 Gr. 178. Without a word of evidence we say we are entitled to the commission which we ask for; if to less, the *onus* was on the respondent to shew it. Here though there were two executors only one makes a claim, the master, therefore, would have been justified in saying: "the work done is worth five per cent., and as only one executor claims he is entitled to this": *McWhorter v. Benson*, Hopk. Ch. R., 2nd ed., p. 28, contains a very interesting discussion of commission as

compensation. See also the American notes to *Robinson v. Pett*, W. & T. L. C., 4th Am. ed., vol. 2, p. 512.

Boswell for W. Magrath. The duties performed here were very little onerous. The petitioner admits that the solicitor Robertson had the whole thing to look after.

[FERGUSON, J.—Do you contend Mr. Fleming is entitled to no compensation?]

We do not say that, but we contend that the amount fixed is excessive and exorbitant in this case. I refer to *Williams* on Executors, 8th ed., p. 1868-9; *Thompson v. Freeman*, 15 Gr. 384; *Denison v. Denison*, 17 Gr. 306; *Re Berkeley's Trusts*, 8 P. R. 193. As to costs, we say they should not have been allowed as between solicitor and client.

Blake, in reply. As to costs, the executor should be indemnified out of the estate; and besides, the order of reference leaves it to the discretion of the master and the court will not interfere. In *Denison v. Denison*, *supra*, the commission on the money would not have been enough. Besides each of the executors got a legacy of \$1,200. In *Thompson v. Freeman*, 15 Gr. 384, commission was allowed on re-investments which is a very bad way; the principle laid down in *Re Berkeley's Trusts*, 8 P. R. 193 is sounder. In *Re Batt, Wright v. White*, 9 P. R. 447, only a few weeks was occupied by the work done. Whatever is allowed to W. Magrath should be deducted from what is allowed to Fleming, and the balance allowed to the latter. We would ask that the orders which may be made on these appeals may issue as court orders, and the costs be as of a court motion.

FERGUSON, J.—This is an appeal from the report of the master in ordinary, made pursuant to the order herein on the 12th day of October last, upon a petition presented by Mr. Charles E. Fleming, respecting the allowance that should be made to him for his care, pains, and trouble, and his time expended in and about the executorship of the estate of the late Mr. McGrath. The claim of the

petitioner is made under the provisions of R. S. O. ch. 107, secs. 36-40.

The report bears date the 22nd day of December last, and by it the petitioner is allowed the sum of \$1,600, made up as follows: two and a half per cent. on the sum of \$32,000 of moneys of the estate. and one per cent. on debentures, stocks, and mortgages of the estate, amounting to \$79,200.

It was stated in the argument that these do not constitute the whole of the estate, which was all personalty, and which amounted to somewhere about \$120,000, and it was agreed that the amount of the estate should, if that became necessary, be ascertained by the registrar, without any reference back to the master in ordinary.

It was also said that at the time of presenting the petition, some few acts had yet to be done by the petitioner respecting the estate, or some parts of it, but that it had been agreed before the master that these should be considered as if they had been done, and the allowance to the petitioner finally settled, and the master proceeded, as was stated by counsel, on this basis.

The appeal is on the grounds that the amount allowed is inadequate and insufficient, and that the commission allowed for receiving, managing, and handing over the estate is less than should have been allowed in accordance with the principles heretofore acted on by the court in such matters, and (2), that the master should have allowed the petitioner as compensation for his dealing with the estate at least four per centum on the various portions of the estate so dealt with by him as such executor.

There is also a cross-appeal on the grounds that the amount allowed is excessive and exorbitant, and (2), that the master erred in allowing the petitioner costs as between solicitor and client, instead of as between party and party.

These appeals were heard together.

There were two acting executors of the will. These were the petitioner and William Magrath, a brother of the testator. The third one appointed by the will renounced

probate. By the will and codicil one hundred pounds a year during her life is given to the widow of the testator, and the whole residue of the estate is given to William Magrath, one of the executors. Immediately following this gift to the widow are the words: "*And I commend to his care my said dear wife, and that notwithstanding the above bequest that in so far as in him lies, he shall see that she does not want for all reasonable maintenance and comforts becoming her station in life.*"

This residue (almost the whole of the estate) having gone to William Magrath, one of the executors, he claimed no compensation or commission.

It was conceded that Mr. Fleming, the petitioner is entitled to some compensation. A considerable volume of evidence was taken before the master, all of which was read and commented on during the argument before me. The acting executors, Fleming and Magrath, retained a solicitor (and I dare say very properly) to aid and advise them in their dealing with the estate. They and their solicitor each gave evidence before the master. I do not consider this evidence of so great importance as counsel or some of them seemed to think it. By the evidence it would rather appear that each of the executors was of the opinion that the other had not performed much valuable service to the estate, and that he, himself, had been the chief actor, or at least the important one. The solicitor seems to differ somewhat from both of them in his opinion, for he seems to think that the important parts of the work or most of them, were done by himself. But as I have said, I do not think this evidence possesses in the matter to be considered by me, the importance that was attached to it in the argument.

Both these executors took probate of the will. They jointly retained a solicitor. They acted jointly in the management of the estate. They jointly executed transfers of debentures, stock, &c., and jointly signed no less than forty four cheques in the management and handing over of the estate. Some investments of money were made and

as was under the circumstances natural enough, the mortgages were taken in the name of the executor-legatee, the whole estate, one may say, going to him.

I think the first thing to be determined is, what compensation should have been allowed to these executors, as a body of executors, in case both had claimed compensation ; and, secondly, this being determined, to decide and determine what proportion of such compensation should be allowed to the petitioner Mr. Fleming, the one who does claim it ?

In regard to the first of these, I think a fair and proper way of looking at the matter is to assume, for the purpose, that the residuary legatee was a stranger, or some other relative of the testator, and that the residue of the estate had been properly paid and transferred to him, as in this case it has been to the co-executor, and that both executors were claiming an allowance, and then ask what would be the proper sum or rate to allow.

Against the petitioner, Mr. Fleming, it was contended that, owing to the words employed in the statute, it is the duty of the court to ascertain, weigh and set a value upon the actual work done in respect of the estate, and properly so done, and to allow such value and no more. No case was referred to in which this had been done in fact. Counsel relied, however, upon expressions used by learned judges in some of the cases having reference to the words of the statute. In the view that I take of the cases in our own courts on the subject, and of what has been done under the statute, which has now been in force over a quarter of a century, it is, I think, too late for this argument to be successful, if it ever could have prevailed ; and besides, the argument, on the merits, in favor of adopting such a mode of ascertaining what would be the proper allowance, when it is not compulsory so to do, seems to me to be refuted by the reasoning in what I cannot but consider a very able judgment of the Chancellor in the case *McWhorter v. Benson*, Hopkins Ch. R., (N. Y.) 2nd., p. 28. That case was under a statute somewhat different from our Act, but this subject is considered by the learned judge

without reference to the statute, and I refer to his, as I think, very able treatment of it commencing at page 44.

The cases in our own courts that were referred to on the argument were some eight or nine in number. The respondent relied on *McLennan v. Heward*, 9 Gr. 178, but notwithstanding the language used in some parts of the judgment in that case where the judge was apparently alluding to the words of the statute, I find that near the conclusion of the judgment, at p. 285, he (the learned judge) used these words, "I think five per cent. will generally be a fair commission to be allowed on moneys collected and paid over or properly applied," and he speaks of only two-and-a-half per cent on moneys got in, but not paid out.

In *Chisholm v. Barnard*, 10 Gr. 479, a commission was the mode adopted to ascertain the amount of the allowance, and it was said that five per cent. on moneys passing through the hands of executors may, or may not be an adequate compensation, or may be too much. In that case, the executors were not allowed the commission on certain moneys got in, or work done by an agent, one Knight, the circumstances not, I think, fully appearing by the report of the case, but there, as I have said, the mode of measuring or ascertaining the allowance was by a commission—a percentage.

In *Torrance v. Chewett*, 12 Gr. 407, the accountant allowed the executor a commission of four per cent. upon all transfers of stock, and all moneys paid in and collected by them. Against this there was an appeal, but no cross appeal, and the allowance was sustained, the learned judge, however, referring to the circumstances of the case, which, so far as I can see, do not fully appear by the report of it.

In *Thompson v. Freeman*, 15 Gr. 384, the testator had authorized the executors to carry on the business which he had carried on of a lumberer, miller, and merchant. This they did, and it was held that as to this a commission on the moneys received was not the proper mode of compensating them; but as to other moneys and management of

the estate, it was held that it was the proper mode. These moneys were very large—about \$300,000. There appears to have been investments and re-investments of money, and under the circumstances it was held that five per cent. on the amount of the small mortgages up to \$600, and for sums above that amount three per cent. was sufficient as a compensation or allowance.

In *Denison v. Denison*, 17 Gr. 306, a lump sum of \$1,500 was allowed to one executor and the same amount for the other two executors between them. This allowance was sustained on appeal. The estate was large but required great care and circumspection in dealing with it for a number of years. As I understand lands had to be dealt with, for the learned judge said, at p. 311: "The sum allowed may be much more than *the usual percentage* upon sums received and paid, and still be no more than a reasonable compensation." The learned judge speaks of the percentage on sums received and paid as a thing well known and familiar to every one as a mode of measuring the allowance under the statute. The case *Stinson v. Stinson*, 8 P. R. 560, has, I think, no application whatever to this case or cases of this kind. The question there was chiefly as to the allowance in respect of certain care that was taken of lands in a foreign country, by a trustee, over and above any allowance that he might be entitled to as to other parts of the estate. There was as to these nothing on which a percentage or commission could reasonably be put or placed, and the conclusion was that some better evidence of the services performed should have been given by the trustee.

In the case of *Re Berkeley's Trusts*, 8 P. R. 193, the judgment seems to have been a well-considered one, many authorities having been referred to and commented on. The learned judge stated four propositions as his conclusions on this branch of the law. Only the latter branch of the first of these four is applicable here. It is this: "Trustees properly dealing with the estate and handing it over on the determination of the trust are entitled to one com-

mission for the receipt and proper application of the estate." Commission or percentage is the mode of measuring the allowance there indicated.

In the case *Re Batt, Wright v. White*, 9 P. R. 447, the learned judge considered (1) that the handing over of securities to the amount of \$3,238.25 before the final administration of the estate, or the retention by the devisee of them with the assent of the executors, involved a personal risk to the defendants and necessitated a calculation as to the assets and liabilities, for which it was not unreasonable to compensate them ; and (2) that the amount allowed, \$400, being about two and one-half per cent. upon the receipts and two and one-half per cent. upon the disbursements was not excessive.

Re Stephenson's Estate, 4 Wharton 104, is referred in the 4th American edition of W. & T. L. C., vol. 2, at p. 557, in which the annotator quotes the language, "The responsibility which is incurred by the receipt and disbursement of money is a legitimate subject of compensation." The annotator after an elaborate review of the law in various States of the Union near his conclusion says, at p. 599 : "And some of the rules which appear to be of general application in the absence of statutory provisions to a contrary effect, are that compensation is awarded by means of commissions rather than a gross sum or *per diem* allowance,
* * that compensation is to be given for labour and risk actually incurred and therefore not to be claimed on assuming the trust."

The other authorities I have looked at are chiefly those referred to in *Re Berkeley's Trusts*, 8 P. R. 193, above mentioned, and in the notes to the case of *Robinson v. Pett*, 1 W. & T. L. C., 4th Am. ed., vol. 2, p. 512.

I think I may, without more, express the opinion of which I had scarcely any doubt at the beginning or at the end of the argument, that our courts have adopted a commission or percentage as a means of ascertaining or measuring the amount of the allowance to be awarded to executors, trustees, and administrators under the provisions of the

statute, and that it is the mode adopted generally when the circumstances of the case are such as to admit of its ready adoption, and that the cases in which a different mode or method has been adopted, are to be considered as exceptions to this, which should be considered the general rule, the exception in each instance being for some good reason appearing in the case, and I think it sufficiently appears from the cases that the usual percentage or commission allowed is five per cent. upon the amount of the estate got in and paid over, or properly applied, and that this in the ordinary case is allowed upon the determination of the trust, although there are exceptions to this last. This rate of five per cent, in the ordinary case, seems to be so generally alluded to in the authorities, that I think it may be safely said to have been adopted as the general rule in measuring the allowance under the provisions of the statute.

Then, if it were assumed, as I have said, that this estate had been handed over to a stranger legatee, or some other relation of the testator, and both executors had claimed the allowance, would there be anything to take the case out of the general rule? It may be said that the estate was not all in money; that the case is not that of getting in or paying over money. But was not all personal estate and money, or goods, bonds or securities, or stock the equivalent of money, the caring for and final handing over of which would have involved, as said by the learned Judge in *Re Batt, Wright v. White*, 9 P. R. 447 a personal risk to the executors, and would not this risk have been just the same, or at all events, no less than the risk that would have been incurred in caring for, and finally handing over money to the like amount? It was said and admitted on the argument, that the administering of the estate lasted, and necessarily lasted about one year before the final handing of it over. The amount of the estate is not nearly so great, so far as I have seen, not half so large as were the estates in which, according to the cases, the rate of the commission was reduced by reason of

the magnitude of the estate dealt with by the executors or trustees, and after some anxiety on the subject, I fail to see that in the case that I have put, there would be sufficient reason for departing from what I think is the general rule, allowing the five per cent. on the final handing over of the estate, as the amount of the allowance under the statute.

Then, so far as concerns commission, how does the case that I have supposed differ from the present case where the estate has been handed over to one of the executors as the legatee thereof, who as a matter of course, asks no commission or compensation? The answer that readily suggests itself to one, is that it is only necessary to give to the executor who does not get the estate one-half of the usual commission, to make the two cases in this respect alike.

There are, however, two other matters that should be considered before disposing of the allowance in this way

I have already set forth the clause in the will by which the testator commended to the executor-legatee the care of his widow, and that notwithstanding anything in the will contained, he should so far as in him lay see that she should not want for reasonable maintenance, comforts, &c.

I am not asked to construe that clause, nor do I think it necessary so to do for the purposes of this appeal.

Whether or not it creates any trust or charge in respect of the estate, or any claim against the legatee who takes the estate, I think the subject was a proper one for the care and consideration of the executor who is not the legatee before handing over the estate to his co-executor. The petitioner, Mr. Fleming, as was admitted, did attend to this matter, and succeeded in procuring from his co-executor, Mr. Magrath, a bond for the payment to the widow of \$600 a year during her life, in addition to the small legacy that she takes under the provision in the will. In dealing with this matter it is plain, I think, that what he was endeavouring to accomplish was against the interest of his co-executor, who, as I understood, was at first not willing

that anything of the kind should be done. At all events, it was admitted that the petitioner had much trouble in bringing about what was done, but it was sought to attribute this to his friendship for the family, or the widow herself, instead of to the performance of any part of his duties as executor. I do not take that view. I think it was a proper thing for him to do as executor before handing over the estate to his co-executor, and I think the contention that his attention to it should be attributed to his friendship for the family is not a fair contention. I apprehend that many executors are appointed for the reason, amongst others, that they are friends of the family of the testator, and surely it could not be successfully contended that because they were friends of the family they should not receive any allowance under the statute

Thus looking at the position of the respective executors in administering the estate, it seems to me that the petitioner, Mr. Fleming, was in a position to be to a large extent deprived of the benefit of consultation with and the joint care of his co-executor in seeing that the estate was properly administered, and that his position was such that he was obliged to see that the administration was properly done or remain liable in respect of any errors or mistakes, whereas his co-executor need not exercise the same degree of care and diligence, for in case any claim should be subsequently made against the executors, he would have the means in his hands by reason of his being legatee, and the estate being handed over to him, to satisfy it out of the estate if it ought to be so satisfied. In regard to the necessary care with respect to the risk in receiving and paying over or otherwise properly disposing of the estate, the petitioner was (to a large extent, at all events) in the position of a sole executor, and this "risk" is, as it seems to me, a subject of compensation or allowance, and, I do not think that it makes any difference in this respect that the respondent's counsel was able to say that there was not in fact much, if any, risk in regard to this particular estate.

It was also remarked during the elaborate argument of the case that the petitioner might have protected himself in respect to risk by availing himself of the provisions of the statute, by publishing in the prescribed way a notice to creditors, &c. I have not, however, learned that executors who avail themselves of the provisions of that statute thereby deprive themselves of any part of their allowance. No authority on this subject was referred to. For the two reasons that I have referred to I am of the opinion that the petitioner, Mr. Fleming, is entitled to more than one-half of the usual allowance of five per cent., and, after the best consideration I have been able to bestow upon the subject, I have arrived at the conclusion that he should be allowed at least one per cent. in addition to the one-half of the five per cent., which will make three and one-half per cent. It is difficult to satisfy one's mind in regard to this allowance additional to the half of the usual allowance. If, however, I am in error as to the amount of it, I cannot but think the error is in not allowing enough.

I think the learned master was right in allowing the costs as between solicitor and client.

The appeal will therefore be allowed, with costs. The order will fix the allowance to the petitioner at a commission of three and one-half per cent. on the amount of the estate. The cross-appeal will be dismissed, with costs. The costs of each of the appeals will be costs as between solicitor and client. The registrar will ascertain the precise amount of the estate, as it was agreed between counsel that he should, for the purpose of ascertaining the amount of the commission.

Order accordingly.

NOTE.—If the practice authorizes it, I am willing that the order should be drawn up as a court order, and not an order in chambers, as the appeal is one that, on account of its importance and magnitude, would have been directed to be heard in court, if an application had been made when it was called for argument.

The registrar having refused to issue the order as a court order unless by express direction of the judge, the matter was brought up before him on behalf of the petitioner, on March 1st, 1886.

Lefroy, for the petitioner. G. O. Ch. 642, gives the judge power to dispose of the appeal "on such terms" as he thinks proper. Moreover, whether the order is to issue as a court order or a chamber order, is a matter of the business of the court, which is in its discretion: *Re The Agriculturalist Cattle Assurance Co.*, 11 W. R. 330. What is asked has been often done by consent of parties. At all events, O. J. A., 1881, rule 428, allows a direction that the costs are to be as of a court motion.

Boswell, contra.

FERGUSON, J.—The appeal came on in chambers. If an application had been made to have it adjourned into court I would have granted such an adjournment, or I might have so adjourned the case without an application. The importance of the appeal, and the labor and skill required of counsel would have well warranted that course. But it seems to be another matter where no such adjournment by me took place, and the application was not made till after the argument in chambers. Counsel seemed to agree in saying that what is asked now has not been granted in any case in which there was any opposition to it, and, so far as I have been able to discover, such is the fact. This application being opposed, I do not see my way to saying that I have the power now to direct that the appeal and argument shall be considered as having been in court and not in chambers, and that the order should be drawn up as a court order, or that there should be costs as if the appeal had been argued in court and not in chambers. This application will be refused, but without costs, as it was in a measure invited by myself in the concluding part of the judgment.

RE GORDON V. O'BRIEN.

Prohibition—Division court—Splitting amount to give jurisdiction—R. S. O. ch. 47, sec. 59—Ascertainment of amount.

The defendant rented certain premises from the plaintiff for a year, agreeing in writing to pay monthly \$125 therefor, but no formal lease was executed. When the rent had become four months in arrear the plaintiff entered three plaints in a Division Court against the defendant, each for a month's rent, \$125.

Held, that the sums claimed in the three plaints were payable under the one contract, and would have been included in one count under the old system of pleading; and, therefore, that the division into three plaints was improper under R. S. O. ch. 57, sec. 59

Held, also, that the defendant's signature to the memorandum of lease could not be construed as ascertaining the amounts claimed in the plaints; and prohibition was ordered.

[March 2, 1886.—O'Connor, J.]

THIS was an application for a writ of prohibition to be directed to the judge of the County Court of the county of Perth, to prohibit the trial of three suits in the first Division Court of that county, on the grounds:

1. That the plaints constitute one cause of action, and that such cause of action has been divided into said plaints for the purpose of bringing the same within the jurisdiction of the said court.

2. That the said plaints are not, nor are any of them, within the jurisdiction of the said Division Court, the amount claimed not being ascertained by the signature of Martin O'Brien, the defendant.

The facts appear in the judgment.

Woods, Q.C., for the motion.

Idington, Q.C., contra.

O'CONNOR, J.—Section 54, sub-section 2, of the Division Courts Act, R. S. O. ch. 47, gives the Judge of the Division Court jurisdiction to determine:

"All claims for debt or for any sum payable under or upon any contract for the payment of money, or for payment in labour or in any kind of goods or commodities

or in any other manner than in money, where the amount or balance claimed does not exceed one hundred dollars."

Section 59 provides :—" A cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction of a Division Court, and no greater sum than one hundred dollars shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds four hundred dollars."

The said section 54 is amended by section 2 of the Division Courts Act, 1880, 43 Vic. ch. 8, (O.), by adding the following sub-section after the word dollars in the 2nd sub-section of said 54th section : "(3) All claims for the recovery of a debt or money demand, the amount or balance of which does not exceed two hundred dollars, and the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents."

The effect of this amendment is obvious, and requires no special notice here.

The suits in question have arisen from a contract between the parties, which reads as follows: "Memorandum of bargain and lease made this 18th day of April, A.D. 1885, between William Gordon, of the city of Stratford, in the county of Perth, in the province of Ontario, of the first part, and Martin O'Brien, of the city of Kingston, in the said province of Ontario, of the second part.

"The said party of the first part hereby leases to the said party of the second part, for the period of one year from the first day of May next, the hotel and furniture therein, situated on the corner of Market and Albert streets, Stratford, known as the Windsor.

"He, the said party of the second part, agreeing to pay therefor a monthly rent of \$125, and taxes, the first of such monthly payments of rent to be made on the first day of June next. The said party of the second part to have the privilege of a renewal of this lease for a further

period of three years at a yearly rental of \$1,200, payable as above named, provided he purchases the furniture therein at a valuation. The said party of the first part to place therein twenty-five new mattresses, new tapestry carpet on the second hall and in four other rooms, build boot room, fix up billiard room as sample room, and if required by the said party of the second part to place in kitchen a steam table to cost not more than fifty dollars, and return piano if required, and extend laundry, the latter to be done during the fall of this year. The said party of the second part to purchase all the linen towels and sheeting placed in said hotel, and the stock of liquors and stores in general use. A lease to be prepared by the said party of the first part, embodying the foregoing terms and conditions, and forwarded early next week to Kingston for execution." And this memorandum was executed by the parties thereto.

Except the lease for one year and the rent to be paid for that term, the memorandum is indefinite in its terms, and I rather incline to the opinion that a lease prepared in strict accordance with it would also be indefinite and unsatisfactory.

However, the formal lease contemplated has never been executed ; but it appears the lessee entered into possession on the fourth instead of the first of May, and the landlord agreed that the rent should begin to run on and from that day, so that the monthly rent would fall due on the 4th.

The landlord admits that the tenant paid on account of rent \$125, \$150, and \$75, in all \$350.

After the 4th of December the landlord brought three complaints in the Division Court against the tenant: 1st. For \$125 for one month's rent due on the 4th of October ; 2nd. For \$125, one month's rent due on the 4th November ; and, 3rd. For \$125, one month's rent due on the 4th December.

The first case was tried and judgment given for the plaintiff, the judge overruling the objection to his jurisdiction, which objection was made in the form stated in the notice of motion ; and also that the agreement to

lease was conditioned on the preparation and execution of a lease containing conditions.

The defendant relying on the objections, offered no other defence. The plaintiff stated at the trial that he abandoned the rent for August.

The question is, are the grounds stated in the notice of motion sustainable in law, on the facts of the case?

The English Small Debts Acts, 9th and 10th Vic. ch. 95, sec. 63, is in substance like the corresponding section in our Division Courts Acts, above stated.

It provides, "that it shall not be lawful to divide any cause of action for the purpose of bringing two or more suits in the said courts, but any plaintiff having cause of action for more than £20, for which a plaint might be entered under this Act, if not for more than £20, may abandon the excess, and thereupon the plaintiff shall, upon proving his case, recover to an amount not exceeding £20. And the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such causes of action, and the entry of judgment shall be made accordingly." By a subsequent Act the amount to be recovered was increased from £20 to £50. The case cited on the argument herein, *In re Aykroyd*, 1 Ex. 479, was decided before the jurisdiction was increased to £50. This remark is of no importance, except to prevent misconception, which might arise from the fact that throughout the case £20 is stated as the limit of jurisdiction.

The circumstances of the case are peculiar, and are thus stated by Pollock, C. B. (p. 488): "It appeared from the affidavits, that on the 19th of September last, 228 summons were issued out of the County Court at the suit of the plaintiff, Grimbly, against the defendant Aykroyd, for sums amounting in the aggregate to £303 19s., one claim only amounting to the sum of £5, and many to less than twenty shillings. These demands arose out of an order alleged to have been given by the defendant, a railway contractor, to the plaintiff, a grocer, to supply with goods the workmen employed by certain persons who were sub-contract-

tors with the defendant. Tickets appear to have been given by the sub-contractors, and signed by them, each for a certain amount, and these tickets amounted to 3,000; but actions were brought, not for each supply, but apparently each for the amount of all the supplies to one workman. The defendant's affidavit denies all liability to these demands, on the ground that he never gave the order, or, if he did, that he never was personally liable, but only as a guarantee; and the order was not in writing. But for the purpose of our present decision this is wholly immaterial; the question being, whether, on the assumption that he was indebted, the county court had jurisdiction."

"We are next to consider," says the Chief Baron, (p. 491) "the 63rd section, and the whole question turns upon the meaning of the term 'cause of action,' in that section."

Further on he says: "To provide that one cause of action on one entire contract should not be divided, would be unnecessary and surplusage."

Again, (p. 492): "We think we may safely conclude that the term 'cause of action' ought to be interpreted one cause of action, and not to be limited to an action on one separate contract;" and after referring to a decision of Mr. Justice Coleridge, he proceeds: "It appears then that great inconvenience would follow if the term 'cause of action' were interpreted to mean cause of action on one separate contract, and also if the construction were to be that it was intended to cover all contracts executed, however dissimilar in character, that could be included in one indebitatus count, which, according to the modern practice, may comprise any number of separate unconnected contracts, whenever made, each having ended in a debt before the commencement of the suit. As some extension must be given to the former construction, some restriction must be put on the latter." The prohibition was granted.

In the case just mentioned special reference was made to "tradesmen's bills, in which one item is connected with another, in this sense that the dealing is not intended to terminate with one contract, but to be continuous, so that

one item if not paid shall be united with another, and form one entire demand." That remark was doubtless elicited by the fact that the plaintiff in the suits in the inferior court, was a tradesman.

But it is worth while to remark that every order given in favour of a workman for goods, and the acceptance and compliance therewith formed a separate and distinct contract, though of the same kind, and that was the only principle of unity connecting those several contracts, and making them one indivisible cause of action.

In the case now under consideration there is but one contract to pay rent in monthly parts for a year.³

In *Wickham v. Lee*, 12 Q. B. (Ad. & El. N. S.) 521, it was decided that it was not a dividing of the cause of action within section 63, to levy one plaint for rent of premises, and another (under Stat. Geo. II., ch. 28, sec. 1) to recover double value for holding the same premises after the expiration of a notice to quit. The distinction is clear, and at once observable: that the double value recoverable under that statute is a penalty, expressly so called in the statute. Debt for use and occupation, and for double value are, as Coleridge, J., said, distinct causes of action; and Erle, J., said: "It is not a splitting of actions to bring distinct plaints where, in a superior court, there would have been two counts."

On the argument before me, Mr. Idington, for the plaintiff, pressed on my attention the case of *Higginbotham v. Moore*, 21 U. C. R. 326; but I am unable to see that it affords any appreciable assistance in the consideration of this case.

The point for decision there was different. The account, as sued upon, was for a balance of £25, on an account for more than £50; and although the account was made up partly of £26, on two promissory notes, which were of course liquidated and reduced the amount of the account below £50, yet as the whole account was not a settled one, it was objected to; and the learned judge of the Division Court, having given judgment for the plaintiff, granted a new trial,

upon the defendant's motion, but allowed the plaintiff to so amend his plaint as to remove the objection. A writ of prohibition was moved for, principally on the ground that the allowance of the amendment was irregular. But the court held on the authority of *Jolly v. Baines*, 12 A. & E. 209, "that a matter of irregularity in practice only was no ground for interfering by prohibition."

In re Hall v. Curtain, 28 U. C. R. 538, was a motion for a writ of *mandamus* commanding a Judge to try a case in the Division Court. The plaint was to recover a balance of \$84, due for rent of premises occupied by the defendant as the plaintiff's tenant for a period of eight years at \$160 a year, after deducting payments made from time to time. It was held that the case presented to the judge for trial, was for a balance due on an unsettled account, the whole amount of which exceeded \$200, that the judge was right in refusing to try the plaint, and the *mandamus* was refused.

It appears that the plaintiff in the plaints now in question has availed himself of a suggestion, contained in the judgment of Morrison, J., in the case last mentioned. He said, (p. 538): "Why the plaintiff was compelled to adopt this mode of proof upon his own case one cannot readily see. If the tenancy was admitted by the defendant, and the payments made during the three years were payments made on account of the rent, all that the plaintiff had to do was to sue for the last, say seven months' rent; but if the matter in dispute was either the amount of rent payable, or the duration of the term, and either of these facts had to be investigated and determined before the balance could be struck, in such a case the judge, I think, would be trying a case beyond the jurisdiction—viz., to recover a balance due of an unsettled account over \$200."

I must say, that I do not clearly apprehend, and so do not distinctly understand, what the learned Judge meant by what is said in the first part of the foregoing paragraph, in view of the fact previously stated in the case, that the plaintiff had offered evidence that the defendant

had "made payments on account of rent at various times, leaving the balance claimed due to the plaintiff." Apparently following the suggestion, however, the plaintiff states at the trial that he abandons the rent for August, although the payments admitted do not fully pay the rent up to that month, and he sues in separate actions for the rent for September, October, and November. But he does not in any of his complaints say that he abandons anything.

Wilson, J., in that case, says (p. 539): "I am quite satisfied that by the direct language of the 59th section no action for the balance of an account can be brought in the Division Court, where the unsettled account in the whole exceeds two hundred dollars,"—now \$400.

In re McKenzie v. Ryan, 6 P. R. 323, decided that a plaintiff, to give a Division Court jurisdiction where his claim is in excess, must abandon the excess in his claim, and cannot wait until the hearing and then do it.

In this instance there is, as already remarked, only one contract to pay rent monthly, \$125 per month, upon a tenancy for one year. The landlord might, if he chose, sue at the end of every month upon that contract for the rent of the month; but if he allowed the rent to run on for several months, as he did in this case, the rent for these months would be due on one contract, and would form one cause of action. The cause of action arises on the contract. Several breaches of the same contract constitute but one cause; and under the old system of pleading the whole would be recovered upon one count; a count for every breach would be not only unnecessary, but not permissible. And this is the criterion laid down by Erle, J., in *Wickham v. Lee*. The rule laid down by Morrison, J., for taking the case out of the operation of the restrictive clause of the statute in *Re Hall v. Curtain*, does not apply for the defendant did not admit the contract, albeit that it was in writing, and therefore the plaintiff had to prove it, had to prove the tenancy, and the amount of rent; and he had also to prove, as a fact not in the written contract, that the tenant entered into possession under the lease, for

that was a fact subsequent to the execution of the contract. From the tenant's entry to the time of suit, seven months had elapsed, the rent for which would be \$875. The \$125 first paid was probably for the first month, and might be so applied.

The sum of \$150 could not be for any specific month, and was probably paid generally on account ; and the same may be said of the \$75.

Then it appears that the tenant really denies that rent is due ; asserts the agreement was subject to conditions which have not been fulfilled by the landlord, and whether this contention is well or ill-founded is immaterial, it would throw the question open for trial, and would clearly oust the Division Court of jurisdiction ; besides, the amount of the account is not ascertained by the signature of the defendant, for it is absurd to say that his signature to the memorandum of lease may be so construed. Upon the whole, I have no doubt that it is a proper case for prohibition.

I was pressed on the hearing to listen to supplementary affidavits offered to shew that the applicant had no merits, with a view to influencing a decision on the question of costs : but I declined entering on a trial of the merits ; nor do I see anything in the case to relieve it from the ordinary rule as to costs. The writ of prohibition will therefore go with costs.

NOTE.

RE EBERTS ET AL. V. BROOKE.

The judgment of GALT, J., (10 P. R. 257) was reversed on appeal by the Queen's Bench Divisional Court on the 23rd of May, 1884.

DUNCAN ET AL. V. TEES.

The order of ROSE, J., (11 P. R. 66) was varied on appeal by the Queen's Bench Divisional Court on the 24th of November, 1885, by directing the parties to proceed to the trial of an issue at the next assizes, the execution creditors to be plaintiffs and the claimants to be defendants, and the question to be tried to be, whether at the time of the seizure the goods in question were exigible under the creditors' execution, or the execution of either of them, as against the claimants.

CANADIAN PACIFIC RAILWAY COMPANY V. CONMEE ET AL.

Fraud—Production of documents—Privilege—Particulars.

In an action to recover back payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiffs' line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent:

Held, that documents shewing the results of measurements and surveys made by the plaintiffs for the purpose of litigation were privileged from production, even if they were procured for the purposes of another action between the same parties; but,

Held, that information obtained by means of the measurements and examination of the company's surveyors was not *per se* privileged; and the plaintiffs were therefore ordered to give particulars of the errors in the certificates on which they relied, although this might involve the disclosing of matters of fact derived from privileged communications.

[March 24, 1886.—*Boyd, C.*]

[May 7th, 1886.—*The Court of Appeal.*]

AN appeal by the defendants from two orders of the Master in Chambers, (1) refusing to direct the plaintiffs to file a better affidavit of documents; (2) refusing to direct the delivery of further particulars of the statement of claim.

The action was brought by the railway company against Conmee & McLellan, contractors for the building of the road, to recover payments made upon progress certificates alleged to be false and fraudulent.

The defendants by these applications were seeking to obtain information as to measurements and surveys made by the plaintiffs upon which the latter relied to prove that the progress certificates were false. The plaintiffs objected to produce the documents relating to these matters on the ground of privilege.

Wallace Nesbitt, for the appeal.

R. M. Wells, contra.

BOYD, C.—Payments of ninety per cent. made upon progress certificates are now sought to be recovered on the ground that these certificates are false and fraudulent.

This is mainly because as alleged the classification of work done was wrong, and the measurements overestimated. Proof will doubtless be given of the errors in these respects as to each one of the certificates which the company seeks to falsify. It will facilitate the trial and point the issues to be tried if the matters alleged to be wrong in each certificate complained of are particularized, as far as possible, and I understand that the material in the hands of the company will enable them to do this. If the parties desire to try the whole case without a reference, as it is said may be done, then all the particulars of error on which the plaintiffs rely should be given; if it is only sought to procure evidence to afford foundation for a reference, then the special overcharges relied on for this purpose should be given, so that the contractors may be able to address evidence to the specific points relied upon by the company. At present the defendants may be taken by surprise as to some matters of attack, and I do not see that there is any disclosure of privileged matter if I require the company to give in detail what they charge to be false and fraudulent in each certificate they intend to attack. See judgment of Cockburn, C.J., in *English v. Tottie*, 1 Q. B. D. 144. These particulars will perhaps supply the *facts* or figures on proof of which they hope to recover; but the giving of such particulars does not reveal by what evidence they intend to establish their case: *McCreight v. Stevens*, 1 H. & C. 454; *Bradbury v. Cooper*, 12 Q. B. D. 96, per Smith, J.

It appears to me that the contractors would have a right to examine the officers of the company with a view of ascertaining specifically what was complained of as to each certificate, and if so, then this may be arrived at compendiously by ordering particulars. What is sought is information as to the matters of fact patent to the senses on which the company seek to recover the moneys paid by them. This may involve the disclosing of matters of fact derived from privileged communications, but it is no breach of the rule which protects documents so privileged.

The distinction was adverted to in *Kennedy v. Lyell*, 23 Ch. D., by Baggallay, L. J., at pp. 401, 402, as one between a person being called upon to answer as to matters of fact, and being called on to answer as to matters of confidential communication.

The same point of distinction is also marked by Cotton, L.J., in *Southwark v. Quick*, 3 Q. B. D. at p. 321, where he distinguishes between different modes of discovery and speaks of a case where officers of a company may have to disclose knowledge obtained from a communication though the communication itself may be a privileged document.

I must regard the information obtained by means of the measurements and examination of the company's surveyors as not *per se* privileged: the results are matters of fact involving less or more of earth and rock and excavation and filling. It is important also to remark that the company's officers expressly invited the contractors to take part in this examination, the result of which they now seek to protect as privileged.

Upon the importance and propriety of particulars in such actions as this involving an infinitude of detail, I may refer to the language of Coleridge, C. J., in *Godden v. Corsten*, 5 C. P. D. 18, 19.

Sooner or later if the company is going to succeed the details of the measurements and the errors complained of must be investigated, and if I am premature in now ordering particulars it is safer to do so than to run the chances of a deadlock at the trial. In a late case Mr. Justice Cave said: "I must say I think it very dangerous for one party to refuse to give particulars. The object of such refusal is manifest; and if they are not given, and prove to be necessary, I should simply adjourn the case, and compel the party refusing to pay the costs: *Re Carvill*, 1 Mor. B. C. 151. I refer also for a decision shewing the importance of clearing the way for a fair trial to *Germ Milling Co. v. Robinson*, 34 W. R. 194.

The surveys themselves were procured for purposes of litigation, whether in this or in the action threatened by

the contractors does not much matter : *Pearce v. Foster*, 15 Q. B. D. 114. I see no reason to differ from the Master as to the application for production. That appeal is dismissed, with costs. But as to the application for further particulars it deserves to be favourably entertained, and I allow the appeal, with costs in the cause to the contractors.

Pursuant to leave obtained from Boyd, C., the plaintiffs appealed from the foregoing decision to the Court of Appeal.

Robinson, Q. C., and *R. M. Wells*, for the appellants.

Osler, Q. C., and *Wallace Nesbitt*, contra, were not called upon.

Appeal dismissed, with costs.

JENNINGS V. THE GRAND TRUNK RAILWAY COMPANY.

Defence—Not guilty by statute—Particulars.

Where the plaintiff was not aware of the defence intended, qualified particulars of a defence of not guilty by statute were ordered.

[March 24, 1886—*The Master in Chambers.*]

AN application by the plaintiff for an order for particulars of a defence of not guilty by statute.

Shepley, for the plaintiff.

Aylesworth, for the defendants.

THE MASTER IN CHAMBERS.—It is true that ordering particulars of the general issue, being a plea purely in denial, is unknown in suits at common law.

This is a general issue by statute, and therefore of much wider significance.

I must say, however, that I have not known of an order in such case; but I do not see why, where, as is manifest from the correspondence here, the plaintiff is not aware of the defence intended, particulars of the defence should not be given, and I am prepared to make a qualified order for particulars of any defence intended to be set up by the defendants, other than a denial of the facts stated or implied in the plaintiff's statement of claim, and a denial of the legal liability of the defendants to the plaintiff upon those facts as they stand.

I refer to *McCawley v. The Furness R. W. Co.*, L. R. 8 Q. B. 57.

RE PARR.

Infants—Bequest—Foreign guardian.

An application for an order sanctioning the payment of a bequest in favour of infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a Surrogate Court, was refused, and the executors were ordered to pay the amount of the bequest into Court.

Re Andrews, ante p. 199, distinguished.

[April 3, 1886.—*Boyd*, C.]

THIS was an application by the father of five infants, entitled under a will proved in Ontario to a sum of \$500, for an order sanctioning the payment of this sum by the executors to the father, who had been appointed the infants' guardian by a Surrogate Court in Dakota, U. S., where he and the infants resided.

Hoyles, for the applicant.

BOYD, C.—I make no such order as is asked. *Re Andrews*, (ante p. 199,) was a case under the statute for the relief of Insurance Companies, 47 Vic. ch. 20, (O.), in which the company was anxious to pay over the money to

the foreign guardian, and the infants, 15 and 17, were of age to judge what was advisable, and they concurred in the application.

This is a case of bequest to the infants, who I understand are of tender years and do not join in the application, (though that is perhaps not material.) It must therefore be governed by the ordinary practice of the Court, which is not to pay out the infants' money to the father unless a special case is made. The order should be to pay the bequest of \$500 into Court.

HUTTON V. WANZER.

Indemnity—Costs—Solicitor and client—Party and party.

W. sold land to H., and covenanted to indemnify him against a mortgage thereon.

Held, that H. was not entitled to solicitor and client, but only to party and party costs of an action on the covenant.

[April 7, 1886.—*Proudfoot, J.*]

THIS was a motion on behalf of the defendants to vary the minutes of a judgment, as settled by the registrar, in an action upon a covenant for indemnity against a mortgage. The registrar drew up the judgment with a clause allowing the plaintiff costs against the defendant as between solicitor and client.

W. H. P. Clement, for the defendants.

Hoyles, for the plaintiff.

PROUDFOOT, J.—Wanzer sold land to Hutton, which was subject to a mortgage, and covenanted to indemnify him against the mortgage. He did not do so, and Hutton incurred costs in defending the action of the mortgagee, and had to pay the mortgagee's costs. It is conceded that he is entitled to recover the costs he paid to his solicitor,

as between solicitor and client. The plaintiff now has brought an action against the defendant to compel an indemnity, and contends that he is entitled to solicitor and client costs of that action. I do not think him entitled to anything more than ordinary party and party costs.

In the cases cited to me of *Smith v. Compton*, 3 B. & Ad. 407; *Sparkes v. Martindale*, 8 East 593, and *Howard v. Lovegrove*, L. R. 6 Ex. 43, though it was held that the plaintiff was entitled to the costs he had to pay in the action brought against him, and the solicitor and client costs he had to pay to his own solicitor, it does not appear that he was allowed to recover any other than party and party costs in his action to compel indemnity.

These and many other cases are referred to in *Williams v. Crow*, 10 A. R. 301, 306, but none of them lend any countenance to the claim now made.

The covenant to indemnify does not in fact apply to costs incurred in this action. Even in suits or actions by a surety against his principal, the plaintiff seems only entitled to party and party costs. The decrees in *Seton on Decrees*, 1181, direct the principal to pay *taxed costs*, and these mean costs as between party and party: *Ib.* 124.

See also *Peterborough Real Estate Investment Co. v. Ireton*, 5 O. R. 47; *Trust and Loan Co. v. Covert*, 32 U. C. R. 222.

RE KINGSTON AND PEMBROKE RAILWAY COMPANY
AND MURPHY.

*Railways—Expropriation of lands—Order for immediate possession—
47 Vic. ch. 11, sec. 12 (D.)*

Immediate possession of land, alleged to be necessary for the purposes of a railway, should not be granted to the railway on summary process under the Railway Act unless two points are very clearly established : First, that the company has an indisputable right to acquire the land by compulsory proceedings ; and second, that there is some urgent and substantial need for immediate action ; and inasmuch as these points could not be said to have been clearly established by the affidavits and arguments in this present case, the Court declined to interfere summarily, and dismissed the application of the railway company for a warrant to enter forthwith upon the lands.

Quære, as to power of Judge to award costs directly under the Statute, 47 Vic. ch. 11, (D.)

[March 17, 1886.—*Boyd, C.*]

THIS was an application by the company to the Hon. John Alexander Boyd, as a Judge of one of the Superior Courts, under sub-sec. 28 of the Consolidated Railway Act of 1879 (D.), and sec. 12 of the amending Act of 1884 (41 Vic. ch. 11 [D.]), for immediate possession of land belonging to Mrs. Murphy, in the city of Kingston, and opposed by Mrs. Murphy.

The company had acquired, by purchase, certain property called Market Battery, south of their present terminus and station about a third of a mile. On this they were building a new station-house, &c., and were desirous of extending their line in the city of Kingston from their old terminus on Barrack street to this new station. Before this time the company had running powers over the line of the Grand Trunk Railway to the part of the city where their new station was being constructed, but they now desired to construct a track of their own. Mrs. Murphy's property, which the company sought to expropriate, lay to the south of the new station, and was required for shunting purposes, and for connecting the company's line with the Grand Trunk Railway.

Mrs. Murphy disputed the right of the company to expropriate her lands. The company was incorporated in 1871

by 34 Vic. ch. 49 (D.), with power to construct a railway from a point within the limits of Kingston to and into the town of Pembroke. So far as the city of Kingston was concerned the railway was completed in 1873. The plan of the railway, which was filed some years before that, terminated at the present station, and this locality was selected as a site for a station at Kingston, and was represented by the company to have been so selected. The city of Kingston, by by-law, gave a bonus of \$300,000 to trustees to be paid to the company upon certain conditions. One of these was the completion of the terminus and road in Kingston by the selection of a site for a station, and the construction thereof. In the year 1873 the company claimed to have fulfilled the conditions, and the president of the road made a declaration to that effect, and the bonus was paid over to the company. Ever since that time the company had operated the road in Kingston to its present terminus.

No new plans had been filed. The company served the usual notice to treat for the purchase of Mrs. Murphy's land, with a tender of compensation and a demand for possession, and now applied to the Judge on affidavits, proving service of notice and bearing on the necessity for immediate possession.

Affidavits were filed by Mrs. Murphy, shewing that the property in question was leased, and that a warehouse was in course of construction upon it. She also shewed that the company, by their general manager, admitted that they did not require more than thirteen feet of the land in question, although the application was for the purpose of expropriating fifty. The affidavit of the chief engineer of the road, in reply, stated that fifty feet were necessary for the road. The chief reason for urgency was the fact, as alleged by the engineer, that the work could be done cheaper in winter than in summer.

Mrs Murphy had begun a suit in the Chancery Division, which was pending, for the purpose of restraining the company from taking possession.

Cattanach- for the company. The opinion of the company's engineer, if given *bonâ fide*, is the only evidence required by the Court as to the necessity or propriety of taking the land; and the onus of proving *mala fides* rests upon the parties opposing the taking: *Errington v. The Metropolitan D. R. W. Co.*, 19 Ch. D. 559, following *Stockton, &c. R. W. Co.* v. *Brown*, 9 H. L. C. 246, where it was held that the Court below could not act on the opinion of an engineer appointed by itself as against the opinion of the company's engineer: *Wilkinson v. Hull &c. R. W. Co.*, 20 Ch. D. 323, is to the same effect, and *Jenkins v. Central Ontario R. W. Co.*, 4 O.R. 593, in our own courts. Then as to whether the engineer was acting in good faith, it would suffice to say that Mrs. Murphy was willing that the company should get a part of the land; that the only dispute was whether they should get a few feet more or less, and that, as in the *Errington* case, cited above, she had only made a general suggestion, not based on specific facts, questioning the *bona fides* of the company. As regards the necessity for a plan, it has been expressly decided that deviations within the prescribed limits can be made without filing a plan: *Grimshawe v. G. T. R. W. Co.*, 19 U. C. R. 493. The object of filing a plan is only to give notice, so that neither the owner nor others can use the land to the disadvantage of the company, after filing the plan. See sub-sec. 11, sec. 9 of the Act of 1879. The Act shews, in many of its sections, that land can be expropriated after the general plan has been filed without another plan, as when the additional lands are within the limits of deviation, &c., as, for instance, in sub-sec. 12 of sec. 9, where it is stated that the notice to treat must shew that the land is shewn on the map or plan, "or is within the limits of deviation hereby allowed." As to the extension of the company's powers by the selection of a station-site, *Sadd v. The Maldon, &c., R. W. Co.*, 6 Ex. 143, expressly decided under the English Act, which is substantially the same as ours, that the completion of a road did not prevent its extension subsequently. And see *In re Yorkshire, &c., R. W. Co.*, 1

Jur. N. S. 975; *Simpson v. Lancaster, &c., R. W. Co.*, 11 Jur., at p. 881, and *Wood v. Epsom and L. R. W. Co.*, 8 C. B. N. S. 731. The only limit of extension is given in subsec. 19 of sec. 5 of our Act, viz., the terminal points between which the line can be built. And at any rate, 46 Vic. ch. 64, sec. 2, (D.), passed since the alleged selection of a site, authorizes this company to extend to the water or water lots, of which this is one. The facts justify the application, and the order should be made. It is conceded, on the authority of *Norvall v. Canada Southern R. W. Co.*, in appeal (not reported on this point), that there is no appeal from the decision of the Judge on the question of the propriety of granting or refusing possession; but this is not so with regard to the preliminary questions of plan, exhaustion of powers, &c., which go to the jurisdiction. If the Judge is exceeding his powers he can be prohibited; and prohibition will lie after making an order as well as before. So that the landowner can have these questions tried in a summary way on the application for prohibition. See *In re Bell Telephone Co.*, 7 O. R. 605; *In re Murphy & Cornish*, 8 P. R. 420; *Hudson v. Tooth*, 3 Q. B. D. 46; *Heyworth v. London Mayor, &c.*, 1 Cababé & Ellis, 312; *Connecticut River R. Co. v. County Commissioners*, 127 Mass. 50; *High on Extraordinary Remedies* (2nd ed.), pp. 154, 611, 616, 617, and other cases.

Black, for Mrs. Murphy. (1.) The admission made by the applicant that there is no appeal from the decision of the Judge in this case should be sufficient in itself to dispose of the application. The company are seeking to exercise extraordinary powers over our property. We deny their right to do this, and raise some new and difficult questions of law in regard to the power of railway companies and the construction of the railway Act. These questions should be tried in the suit now pending, where the parties will have the right to appeal if they wish. (2) Assuming that the company has the power to expro-

priate, no case of urgency such as would entitle them to apply under the second sub-section of section 9 of the Act has been made out. It is suggested only that the proposed construction can be done cheaper in the winter season than in summer, and the difference of this cost is admitted to be not more than \$300 or \$400. A very strong case of "urgent necessity" for immediate possession must be shewn. See *Field v. Carnarvon, &c. R. W. Co.*, L. R. 5 Eq. 190. (3) The company's powers to expropriate land for the purpose of construction are exhausted. They had power given to them to *complete* the road between the *termini* mentioned in their Act of Incorporation. This they have done. They have chosen their location, built their station, and operated their road, and cannot now re-locate: *Blakemore v. Glamorganshire Canal Co.*, 11 Cl. & F. 262; *Brice*, on *Ultra Vires*, 2nd ed, p. 513, note (4), and p. 515; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235; *Atkinson v. Marietta, &c., R. Co.*, 15 Ohio St. 21, and *Pierce on Railroads*, at p. 256, where many other cases are collected. (4) The onus is upon the company, who are seeking to expropriate, to shew that they possess the power to do so: *Lamb v. N. London R. W. Co.*, L. R. 4 Ch. 522; *Webb v. Manchester, &c., R. W. Co.*, 4 My. & Cr. 116; *Richmond v. N. London R. W. Co.*, L. R. 3 Ch., at p. 681. (5) It is claimed that as the Court has held, in *Murphy v. Kingston & Pembroke R. W. Co.*, 11 O.R. 302, that the word "deviation," used in sub-sec. 11 of sec. 8 of the Act in question means "exclusion," the company are within their powers. But the whole of sec. 8 and sec. 9 of the Consolidated Railway Act applies alone to a road in the course of construction. They have no application, by their very terms, to a completed road. If the company have this power, so has every other railway company a similar power. Could, for instance, the Grand Trunk Railway, of their own motion, change their line of track through the city from the esplanade to any distance within the mile limit referred to in this section? Could they expropriate land for such a road? If not, neither can this company expropriate Mrs.

Murphy's land. If sections 8 and 9 are in force after construction, what could have been the object of section 10 or sub-sections 17, 18, or 19 of December 7th? The express powers mentioned in these sections absolutely exclude the idea that the much larger powers contained in sections 8 and 9 continued in the company. (6) There is evidence in this case of bad faith. The company asked for thirteen feet only, and because we would not accept their terms, they now try to expropriate fifty feet. The oath of the engineer of the company is not in any case conclusive as to the necessity for the land. See *Erie & N. R. W. Co. v. Great Western R. W. Co.*, 19 Gr. 43. (7) Such an application as the present should only be granted when a clear case of *right* to expropriate, and *urgency* for immediate possession is made out. Neither of these is made out in this case, and therefore the application should be refused.

BOYD, C.—An application is made by the railway, under the Consolidated Railway Act of 1879, sec. 9, sub-sec. 28, for a warrant to enter forthwith upon the lands of Mrs. Murphy, on the ground that the immediate possession of the land is necessary for the purposes of the railway. By a late amendment of this Act, by 47 Vic. ch. 11, sec. 12, (D.), such applications are to be before a Judge of one of the superior Courts in the Province, and this is the first time such a motion has been made. This summary process, based upon affidavit evidence, should not be directed, if opposed, unless two points are very clearly established: (1) That the company has an indisputable right to acquire the land by compulsory proceedings; and (2), that there is some urgent and substantial need for immediate action. Considering that there appears to be no remedy by way of appeal from the Judge's decision, and in view of the serious consequences which would ensue prejudicial to the owner, if in truth the company is not entitled to expropriate, (see *Norvall v. Canada Southern R. W. Co.*, 28 C. P. 309,) it appears to me that the greatest circumspection should be

exercised in every case where the claim of the company is disputed upon either the facts or the law. Here Mrs. Murphy objects upon both grounds, and I cannot say that the contention made on her behalf is either unmeritorious or devoid of legal right.

Even if my opinion were adverse to her upon the merits, I should not foreclose her opposition in this somewhat arbitrary manner. The construction of various sections and sub-sections of the Railway Act is involved, and most of them have not been heretofore the subject of judicial exposition. Besides that and the other matters which go to the merits of the statutory powers of the company, it is objected that no case of exigency has been made out for the immediate possession of the land. From the location of the piece of land in dispute it is not necessary for carrying on the business of the railway in any such sense that there is peculiar need for its speedy occupation. For the present the company can as well prosecute their business without it as with it. It may be more convenient for the railway to be allowed to enter upon it without waiting to arbitrate, but that is not a sufficient reason to justify the extraordinary remedy asked. The main reason urged upon the papers before me is that it will be less expensive to fill up the water lot now than later on in the season. The difference is not put higher than \$300 or \$400, and this in railway finance, where money is measured by thousands, must be regarded as a mere bagatelle.

I decline to interfere summarily, and must dismiss the application. The costs should go, in any event of arbitration, to the land-owner. I do not know that I have power to award costs directly under this statute. The following cases may be useful for reference: *Field v. Carnarvon &c. R. W. Co.*, L. R. 5 Eq. 190; *Loosemore v. Tiverton and North Devon R. W. Co.*, 22 Ch. D. 25; *Wood v. Charging Cross R. W. Co.*, 33 Beav. 290; *Barker v. The North Staffordshire R. W. Co.*, 12 Jur. 324; *Webb v. Manchester &c. R. W. Co.*, 4 My. & Cr. 116.

CARNEGIE V. COX & WORTS.

Examination of witnesses before trial—Discovery—Rule 285, O. J. A.

The defendants asserted as a counter-claim in this action a claim against the plaintiff, which they had bought from the assignee for creditors of F. and L., stock brokers, who were not parties to the suit. This claim was the balance of an account for carrying stock for the plaintiff. The plaintiff swore that he believed that F. and L. had dealt improperly with the stock that they were carrying for him, but that he had no means of discovering what they had done with it unless by examining them. Under these circumstances an order was made under Rule 285, O.J. A., for the examination of F. and L., for the purpose of discovery only.

[April 12, 1886—*The Master in Chambers.*]

THIS was an application, made under Rules 224 and 285, O. J. A., on behalf of the plaintiff, for an order to examine before the trial for the purpose of discovery, Messrs. Forbes & Lounsborough, under an assignment from whom the defendants made the claim asserted by them as a counter-claim in this action. The facts appear in the judgment.

J. R. Roaf, for the motion.

Hamilton Cassels, contra.

THE MASTER IN CHAMBERS.—I have not the whole pleadings before me, but I understand this cause is at issue in this way—that, as to the counter-claim at least, no answer has been made—the defence and counter-claim having been delivered about a year ago. Why this action has stood so long I do not know.

This motion is for the examination, of Messrs. Forbes & Lounsborough as to the defendants' counter-claim, the brokers to whom it is alleged the claim against the plaintiff therein mentioned, accrued—the defendants having for a small consideration obtained an assignment of the claim from Mr. Clarkson, their assignee.

The defendants obtained an assignment of this claim from the assignee for creditors of Forbes & Lounsborough in a transaction described by defendant Cox, on his examination,

and paid therefor, according to his own opinion, \$100, or it may have been \$200. The claim is \$7,971.23. It is the balance of an account for carrying stock for the plaintiff, and there is nothing at this time to prove whether the claim is just or not.

It appears to me to have been purchased for the purpose of setting it off in this action. The defendant Cox, in his examination, says that was one reason for buying it. Mr. Cox states that he knows nothing of the merits of the claim of Forbes & Lounsborough—so he says in his examination.

The plaintiff has made an affidavit on this motion, from which I make the following extracts:—

“ That the said sum of \$7,971.23, which is claimed to be due by me to the said Forbes & Lounsborough, is not a good or just claim against me, and I have a good defence to the said claim on the merits, as I am advised and believe.

The transactions out of which the alleged indebtedness arose were in dealings in 50 shares of the stock of the Federal Bank, which I ordered the said Forbes & Lounsborough to buy for me, and upon which I paid at various times such sums as were required of me by the said Forbes & Lounsborough, and I made a large number of such payments between the 3rd September, 1883, and the month of December, 1884, in order to keep up the margin on such stock—the said Forbes & Lounsborough alleging that the value of such stock, said to be held by them for me, was falling, for which reason they required the said margin to be kept up.

That I verily believe the said Forbes & Lounsborough did not keep my said stock on hand at all but disposed of it to other parties, and had I called upon them to deliver to me my said stock they would have been unable to do so—and that the demands made by them upon me for alleged margins were improperly made.

That I have no means of discovering what the said Forbes & Lounsborough did with my said stock or how they dealt with the same, without examining them, and

so am advised and believe that it is necessary for me to have an examination of said Forbes & Lounsborough for the purpose of discovery in this action."

The public have latterly had some familiarity with claims of this nature, and what I have known of them makes me the more readily yield to the statements of Mr. Carnegie's affidavit. Forbes & Lounsborough from their position with regard to the plaintiff are I think bound to the fullest disclosure. In this suit the examination cannot be under Rule 224, for Forbes & Lounsborough can neither make nor lose by the result of this suit—but it seems to me necessary for the purposes of justice that they should be examined as to this counter-claim, in order that the plaintiff may be enabled to frame his defence to it, and to this extent I order this examination under Rule 285. It is for discovery I order it, that the plaintiff may be enabled to put in his proper answer.

I do not order that the examination shall be evidence for or against any one. It must be returned to the Court when completed.

PRITTIE V. LINDNER ET AL.

Service of papers—Toronto agent.

Service of papers on a Toronto agent for an outside solicitor is not good unless accompanied with a statement of the name of the solicitor for whom the agent is served.

[April 27, 1886.—*The Master in Chambers.*]

THE plaintiff's solicitor served his statement of claim on the Toronto agents of the defendants' solicitor on the 5th of April. The clerk who effected the service was not able to say who the solicitor was for whom the agents were served. It was shewn that the Toronto firm so served were agents for a large number of country solicitors. On the 6th of April the statement of claim was returned to the

plaintiff's solicitor, and on the 7th of April the plaintiff's solicitor re-served it on the same firm of Toronto solicitors, giving on this occasion the name of the defendants' solicitor. After the lapse of eight days from the day of the first service, the 5th of April, the plaintiff, finding that no statement of defence was filed, signed judgment for default of defence upon an affidavit of the service on the 5th of April.

Holman, for the defendants, moved to set aside the judgment.

MacGregor, for the plaintiff.

THE MASTER IN CHAMBERS set aside the judgment, with costs, holding that the service on the 5th of April was not a good service, by reason of the Toronto agents not having been informed of the name of the principal whom they represented in this action,—the name of the solicitors in the country for whom they were acting as Toronto agents being at the time unknown to them.

RE RAINEY LAKE LUMBER CO.

Security for costs—Action on behalf of others—Financial incompetency of plaintiff.

One S., a contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company and a creditor opposing the petition, where it appeared that S., although he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything would be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified him as to costs.

[April 29, 1886.—*The Master in Chambers.*]

AN order for the winding-up of the above-named company having been obtained one Sheppard, a contributory of the company, filed a petition to set aside the order.

This was a motion on behalf of the company and the petitioning creditor for security for costs of Sheppard's petition, upon the ground that he was prosecuting it on behalf of others, and was not himself financially a responsible person.

J. R. Roaf, for the company.

Worrell, for the petitioning creditor.

J. B. Clarke, for Sheppard.

Clark v. St. Catharines, 10 P. R. 205, and *Clark v. Rama Timber Transport Co.*, 10 P. R. 384, were referred to.

THE MASTER IN CHAMBERS.—This case is certainly very near the border line. It is objected that the motion is made too late, and I think it would be too late, but for the fact which Mr. Roaf mentions, that he is only just now informed of those facts which would justify him in moving.

Upon the merits of the matter, the foundation of my opinion is this, that although it may be argued and technically proved that the petitioner may have an interest in this motion, yet it is plain that he is not moving in the assertion of that interest. He says so himself, and it is plain that he is moving entirely at the request and in the interest of others who are behind him, who have indemnified him as to costs; they being creditors in Winnipeg, out of the jurisdiction.

It is true that he has forty-five shares in the stock of the company, upon which, however, he has not paid anything.

As to his liability as a contributory, he evidently cares nothing for it. He is not in a position to pay any contribution. Indeed, it is quite plain that, personally, he does not care for the result. He looks to those for whom he is acting to indemnify him as to costs.

Upon Mr. Roaf putting in an affidavit, which I allow him to do, shewing the late period at which he became aware that he was entitled to make this motion, I order his security for the costs of his client and for the costs of the petitioning creditor.

RE FOLEY V. MORAN.

*Division Court—Jurisdiction—Setting aside judgment—Time—Rule 270,
O. J. A.*

The Judge of a Division Court has no jurisdiction to set aside a judgment after the expiry of fourteen days from the trial.

Although the defendant has fourteen days to move against a judgment in the Division Court, it is proper for the plaintiff to enter judgment and issue execution forthwith, unless restrained by the Judge to a future named day.

The practice under Rule 270, O. J. A., is not applicable to Division Courts.

[April 29, 1886.—*Wilson, C.J.*]

MOTION by the plaintiff for prohibition, directed to the junior judge of the county of Ontario, to prevent him from giving effect to his order of the 4th of March last, made in an action in the Division Court, whereby he vacated the judgment entered and execution issued upon it, and gave leave to James Moran to file any dispute note which he might be advised, and to prohibit the said judge from interfering with the applicant having execution against the said James Moran, on the ground that the junior judge had no power to make such order, the order not having been applied for within fourteen days after the trial as required by the statute and the rules of Court.

The facts were that the summons issued on the — day of August, 1885, and the defendant James Moran was served on the 13th, and filed his defence on the 20th. The day of trial was the 10th of September. On the application of the defendant it was adjourned to the 17th of December. On that day the defendant failed to appear. The junior judge gave judgment for the plaintiff for the whole claim, \$35.38, and costs, to be paid in one day. Judgment was signed and execution issued upon it on the 19th of December for \$43.06. It was returned "no goods" on the 24th; and on that day a transcript of the judgment was issued to the County Court of Ontario, and it was filed there on the 27th, and execution issued instantaneously against the lands and tenements of the defendant.

On the 18th of January, 1886, the defendant obtained a summons to shew cause why the judgment, &c., should not be set aside. Proceedings were also taken to set aside the transcript of judgment, and they were, as well as the judgment in the Division Court, set aside, and on the 4th of March the summons was made absolute upon the defendant paying the amount of the claim and costs into Court, which was done, and leave was given to him to re-file any dispute note which he might be advised.

On the 17th of March the plaintiff applied to the junior judge for a summons requiring the defendant to shew cause why the order of the 4th of March should not be rescinded, &c., on the ground that there was no jurisdiction to make such order, as no application had been made for a new trial within the time or in the manner required by the Division Court Act and the rules of the Court, but the judge refused to grant the same, because he was of opinion the judgment he had set aside by his order of the 4th of March was a judgment by default, which he had the power to set aside.

The defendant obtained the last named order on the ground that he was absent on the 17th of December by inadvertence, and that he had forgotten the day, which was chiefly caused by his mother's death, which had taken place a few days before the day of trial.

On the 18th of April *Kappele* argued the case for the plaintiff, and *Kean* for the defendant.

WILSON, C. J.—The objection taken by the plaintiff in his motion of the 17th of March to the junior judge making the order of the 4th of March, was that the motion for relief was not made by the defendant within fourteen days after the trial.

That is the only objection, therefore, I shall deal with on the part of the plaintiff. The judgment by default, against which the judge may give relief, is where no dispute notice has been left with the clerk of the Court within the specified time: regulated by R. S. O. ch. 47, sec. 79, sub-sec. 3, and sec. 80.

Then, by sec. 107 the Judge, "upon the application of either party, within fourteen days after the trial, and upon good grounds being shewn, may grant a new trial upon such terms as he thinks reasonable."

Here the trial was upon the 17th of December, and judgment upon the 19th; and the transcript of judgment from the Division Court to the County Court was filed in the latter Court upon the 27th of that month, and it was not until the 18th of January that the defendant moved against the judgment and execution for relief.

If the judgment creditor is entitled to have a transcript to the County Court before the expiry of these fourteen days, the judge must have the power when the transcript is in his own county to set it aside, when within the fourteen days he grants a new trial; but what is to be done if the transcript has gone to another county under section 166?

The party applying for a new trial may therefore not be able to obtain it when the transcript has issued and has been filed in the County Court; and that would shew the party is not entitled to a transcript until after the expiration of the fourteen days allowed for the purpose of moving for a new trial.

I am now however, not considering, as I have said, any other question than whether the defendant can move for a new trial after the lapse of the fourteen days.

I should first say whether the plaintiff is at liberty, under the Act, to enter judgment and to issue execution before the time for moving for a new trial has gone by.

By section 106, when the judge reserves his judgment, the clerk reads it to the parties when the judge sends it to him, at the time named for reading it if the parties are present, "and the clerk shall *forthwith enter the judgment*, and such judgment shall be as effectual as if rendered in court at the trial."

And by section 107: "The judge may order the time or times and the proportions in which any sum and costs, recovered by judgment of the court shall be paid;
* * and the judge, upon the application of either party,

within fourteen days after the trial, and upon good grounds being shewn, may grant a new trial upon such terms as he thinks reasonable, and in the meantime may stay proceedings."

From these enactments the judgment may be entered *forthwith*. There is nothing expressly said as to when the execution may be issued. The judge may order the time for payment of the judgment; but is he obliged to do so? Or is that order required only in cases where the whole claim is not to be levied as of right immediately? And in the meantime he may stay proceedings.

The creditor may issue his execution as of right after the expiration of the fourteen days for his whole claim, although no order has been made for the time of payment; and the order of the judge giving a special day or days for payment of the judgment is required to be made only in cases where the creditor is not to be at liberty to enforce his judgment by execution in the ordinary manner.

It appears to me that is so for section 156 provides that "in case the judge makes an order for payment, &c.," the party entitled to receive payment may if default be made by the debtor sue out execution *instanter*.

The language that *in case* an order for payment is made shews there may be cases in which no order is made, and that construction agrees with the general rule that a judgment may be enforced by execution at once, unless the issue of it be expressly restrained by statute.

In this case the judge gave the defendant one day within which to pay the claim, and he did not pay it within the time so named, and execution issued at once. The question comes round again: Can execution be issued before the fourteen days for moving for a new trial have expired?

Referring then to section 107: Can the judge, although the judgment may under section 106 be entered *forthwith*, direct payment to be made before the expiry of these fourteen days, or can the creditor, when no day for payment has been named, issue execution before the expiration of that

time? As I have mentioned, there is nothing expressly said as to that. But section 107 enacts that upon application being made for a new trial within those fourteen days the judge may "in the meantime stay proceedings."

I do not know how to construe the act otherwise than by holding that the creditor may when he has obtained a judgment, which may be entered *forthwith* after the decision of the judge has been given, issue execution upon it *instantly*, if not restrained by the judge till a future named day, or when ever the named day has gone by and default has been made in making the payment; unless the creditor is expressly stayed upon the application for a new trial under the order of the judge pending such application.

That mode of proceeding is very different from the former course of practice at law, when judgment could not be entered until the time for moving to arrest the judgment or for a new trial had gone by.

In the High Court, upon the trial before a judge, judgment may be entered *forthwith*, and execution issued, and the party against whom the judgment has been given may afterwards move for a new trial. So that the present practice of the higher Courts is in accordance with my reading of the Division Courts Act. So judgment may be entered *forthwith* in actions tried by a jury, and execution issued if the judge make an order to that effect, and the party complaining of the recovery may afterwards move against it.

I am of opinion, therefore, the plaintiff was in this case entitled to enter his judgment, and to issue execution upon it within the fourteen days allowed to the defendant to move against it.

And I am of opinion the defendant having allowed the fourteen days to elapse without moving is now too late to apply for relief.

The rule 270 Jud. Act does not apply to Division Courts. And the terms of that rule are not consistent with the Division Courts Act, sec. 107. For the rule does not limit

any time within which the motion for relief may be made, while the section of the Division Courts Act referred to expressly limits the time to fourteen days.

I do not, on this motion, consider the question of the regularity of the sittings of the Court which were held.

The order will therefore be absolute with costs to be paid by the defendant.

RE MORPHY, MORPHY V. NIVEN ET AL.

Administration order—Judgment, entry of—Execution creditor of legatee—Receiver—Mistake—Action.

A summary order was made for the administration of the personal estate of M. deceased. The order was not entered as a judgment, as it should have been by rule 583, owing to a mistake of an officer of the Court. The L. and C. L. and A. Co., who were execution creditors of one of the legatees and devisees of M., obtained an order appointing the company receiver of the share of the execution debtor, and served notice of this receivership upon the executors of M., but received no notice of the proceedings under the administration order. The company, however, were informed of the proceedings, and upon an *ex parte* motion procured the administration order to be properly entered as a judgment, and then applied for the carriage of the proceedings under it.

Held, that the status of the company was not that of assignee of the legatee, but only of a chargee or lienholder upon the fund or property to which the legatee was entitled; and therefore the company would not have been entitled in the first instance to ask *in invitum* for a summary order to administer; and the slip which was made in not having the order to administer properly entered did not give them any additional right in that respect; but notice of the proceedings should have been given to the company in order that they might be bound by what was done.

A receiver, appointed as the company were here, has a right to assert his claims actively, though he may require in some instances the sanction of the Court; and a contention having been raised as to a forfeiture of the interest of the legatee, leave was given to the company to assert their claim by an action.

[March 31, 1886.—*Boyd, C.*]

THIS was an appeal by the London and Canadian Loan and Agency Company from the order of Mr. Winchester, official referee, refusing to give the appellants the carriage of the proceedings in his office for administration of the personalty of H. B. Morphy, deceased, and a motion on

behalf of the same company for a supplemental order for the administration of the real property of the deceased. The facts as to the position of the appellants and the other material facts appear in the head note and judgment.

Arnoldi, for the appellants.

A. W. Morphy, for the plaintiff.

Moss, *Q. C.*, and *C. Millar* for the defendants, the executors.

BOYD, C.—Summary proceedings were taken by a creditor of the estate for the administration of the personal property. This, it is alleged, is sufficient to pay all creditors. If so, there is no need to administer the realty. So far as the first matter argued before me is concerned, I agree with the referee that the party intervening should not have the carriage of the proceedings to administer the personalty. The position of the applicant is that of an execution creditor of one of the legatees and devisees of the testator, who has obtained an order appointing that creditor receiver of the share of the judgment debtor, and so awarding equitable execution for the satisfaction of the debt. Notice of this receivership being served upon the executors, it would have been prudent on their part to have served the receiver with notice of the taking of these accounts. In analogous circumstances *Pearson, J.*, suggests such a course in *Re Birmingham Co.*, 31 W. R. at p. 416, and for the reason that the taking of accounts would then be final as to all interested therein. For this reason the Master should now bring in the receiver, so that he will be bound by what is done. But it does not follow that the receiver should have the carriage of the proceedings, and the slip which was made in not having the order to administer properly entered does not give him any additional right in this respect. The order was entered by the officer as a chamber order according to the practice which obtained before rule 583, O. J. A., and it was as much an oversight of the officer of the court as of the plaintiff to permit the

order to be issued as complete before it had been entered as a judgment. Being an imperfect and irregular order for want of proper entry, it was carried into the referee's office, and there acted on by the parties and warrants issued. The *ex parte* motion of the receiver in procuring this order to be properly entered as a judgment may operate as a benevolent act which perfected that which was imperfect, but it cannot work destruction on all that had been done on the faith of the order, or oust the rights of the parties named in that order to have the defect cured *nunc pro tunc*. Still less should it operate to give one the carriage of the proceedings, who would not be entitled in the first instance to ask *in invitum* for a summary order to administer. Because the *status* of the receiver is not that of assignee of the legatee, as was argued, but only that of a chargee or lien holder upon the fund or property to which that legatee is entitled. *West v. Downman*, 14 Ch. D. 111, 121, applies to shew that he is not within the meaning of the G. O. 467. Sooner than have the expense of an action the parties might agree to have administration ordered in a summary way at the instance of such a receiver, but here it is objected, in addition to this ground, that under the terms of the will there has been a forfeiture of the interest of this particular devisee, which leaves nothing for the receiver. That is such a contention as must be disposed of upon proper pleadings. I do not feel pressed by the objection that the receiver cannot initiate proceedings. Such a receiver as this, appointed for the benefit of one party only, must of necessity have a right to assert his claims actively, though he may require in some instances the sanction of the court. The language of Jessel, M. R., in *Re Hopkins*, 19 Ch. D. 61, is to be read with its context, and is not used absolutely, as is shewn by the words of the same judge in a later case of *Hills v. Reeves*, 31 W. R. 209. As to real estate, I refuse to grant a supplemental order to administer, but I give leave to the receiver to commence an action in respect thereof in such manner as he is advised. Though the fund is in remainder, not to be enjoyed by the

legatee till the youngest child is of age and not till after the death of the widow, yet he may have present rights to ask for an ascertainment of the property, and for a declaratory judgment: *Yescombe v. Landor*, 28 Beav. 80. But his case, if thus presented by independent action, must be dealt with and disposed of on its merits. If such an action is brought within a month I reserve the costs of this application to be dealt with therein—if not brought I dismiss the application, with costs. As to the appeal, it should be dismissed, with costs. I make now a declaration that all proceedings taken before the referee are to be established and confirmed, and as he for personal reasons desires not to continue the reference, it will be transferred to the Master in Ordinary, to be further prosecuted.

MOORE V. G. MOORE

MOORE V. P. MOORE.

Dower—Pleading and practice—O. J. A.—Dower Procedure Act.

The writ of summons was indorsed under the O. J. A. with a claim for dower and arrears of dower. The defendant entered an appearance, but added to it an acknowledgement of the plaintiff's right to dower, and a consent to her taking proceedings to have the same assigned to her under the Dower Procedure Act, R. S. O. ch. 55. The plaintiff delivered a statement of claim, taking no notice in it of the acknowledgment and consent, and claiming dower and arrears.

Held, that it was necessary for the plaintiff to deliver a statement of claim in order to recover her dower, and she could not, having elected to institute proceedings under the O. J. A., be compelled to take any steps under the Dower Act.

[April 12, 1886.—*Proudfoot, J.*]

The plaintiff in these actions was the widow of Sylvester Moore, deceased, and the defendants were the sons of said Moore and devisees of all his lands.

The writs of summons were indorsed under the O. J. A., with a claim for dower and arrears of dower. The defendants appeared, but added an acknowledgment of the

plaintiff's right to dower, and consented to her taking proceedings to have same assigned to her under the "Dower Procedure Act," R. S. O. ch. 55. The plaintiff delivered statements of claim, taking no notice in them of the acknowledgment and consent, and asking dower and arrears thereof, whereupon the defendants moved before the local judge at London to strike out the statements of claim, on the ground that "as to so much thereof as is made for dower the defendants have filed an acknowledgment that they are tenants of the freehold and a consent that the plaintiff may have judgment for such dower, and that the plaintiff should not proceed to trial in respect thereof, and as to the claim for rents and profits, that the said statement of claim discloses no ground of action and is frivolous, and as to the whole statement of claim that the action is being continued unnecessarily, and solely for the purpose of adding costs."

The local judge ordered the plaintiff to amend her statements of claim within fourteen days, or, in default of amendment, the said statements to be struck out.

The plaintiff appealed from this order.

Hoyles, for appellant. The O. J. A. confers no power to strike out pleadings unless as being scandalous, frivolous, or irrelevant: Rule 178, O. J. A., *Ryan v. Fish*, 10 P. R. 187. The defendants cannot dictate to the plaintiff how to plead: *Rolfe v. Maclaren*, 3 Ch. D. 106; *Millington v. Loring*, 6 Q. B. D. 190. Hence the plaintiff cannot be compelled to proceed under the "Dower Procedure Act," R. S. O. ch. 55, when she has issued the writ under the O. J. A. If so compelled, she would be much embarrassed in recovery of arrears of damages: *Linfoot v. Duncombe*, 21 C. P. 484; *Harvey v. Pearsall*, 31 C. P. 239; *Ryan v. Fish*, 9 P. R. 458. Under Rule 315, O. J. A., delivery of statement of claim must precede motion for judgment. Here the plaintiff is prevented from delivering such statement; hence, if the order of the local judge stands, she cannot set down the case on motion for judgment in order to recover arrears. The

proper course for the defendants is to plead admitting dower and opposing claim for arrears, and asking costs. The "Dower Procedure Act" has not ousted the Court of Chancery of its jurisdiction in actions of dower. *Grieve v. Woodruff*, 1 A. R. 617, and the cases under that Act, do not apply to an action brought under this jurisdiction. The O. J. A. applies to dower actions: *Lauder v. Carrier*, 10 P. R. 612.

Rae, for the defendant G. Moore, and *Holman*, for the defendant P. Moore. Rule 178, O. J. A., provides that a judge may strike out such statements as may embarrass the fair trial of the action, and that all such amendments shall be made as may be necessary for determining the real question in controversy. R. S. O. ch. 49, sec. 8, provides that at any time a judge may make all such amendments as may seem necessary for the advancement of justice and the determining the real question in controversy between the parties. R. S. O. ch. 55, sec. 20, provides that any defendant may file an appearance and acknowledgment that he is tenant of the freehold together with his consent that the plaintiff may have judgment for her dower, and in such case the plaintiff shall not be entitled to tax or recover any costs of suit against the defendant. The defendants have admitted by a proper acknowledgment filed and served that they are tenants of the freehold, and have consented to the plaintiff having judgment; yet the plaintiff has delivered statements of claim against the defendants, as though the defendants still denied the right to dower. This is wrong: *Harvey v. Pearsall*, 31 C. P. 239. All the judge has said is that the plaintiff should set forth the actual facts as they appear on the files of the court, viz., that the acknowledgment put in admits the right to dower. The statement of claim contains no reference to the acknowledgment and confession of the defendant. The order gives relief to the plaintiff to amend generally, and does not direct the plaintiff to proceed in any particular way. Why try a right which is already confessed? If the plaintiff is entitled to any other relief together with the claim for dower, let it be

set up in the statement of claim. The only variation is that upon the face of the statement of claim and upon the record which will be before the court for trial, it will appear that the right has been admitted as the statute provides. The order made by the local master was one within his discretion and rule 178. The parties have adopted the course followed in *Harvey v. Pearsall*. The judgment is the same as in that case, which is practically on all fours with this. The real question in controversy is at most damages for detention of dower, and that is too frivolous and small an amount for the court to entertain, being under \$35. Proceeding under the Judicature Act was extravagant and unnecessary.

PROUDFOOT, J., allowed the appeal, and discharged the order appealed from, with costs to the plaintiff in any event, holding that under the Judicature Act the course taken by her was right; that no injury could accrue to the defendants thereby: and that their application could only have been made for the purpose of embarrassing the plaintiff. It was necessary for the plaintiff to deliver a statement of claim in order to recover her dower, and she could not, having elected to institute proceedings under the Judicature Act, be compelled to take any steps under the Dower Act.

McCaw v. Ponton.

Appeal—Setting down—Dies non.

An appeal from an order made by a local master, on Saturday the 17th April, was set down to be heard on Monday the 26th of April, which was Easter Monday, a *dies non*. The appeal was put on the paper for the following Monday.

Held, that this course was proper and convenient, and also that the proper mode of objecting to the appeal was by a motion to strike it off the list.

[May 3, 1886.—*Boyd*, C.]

THIS was an appeal by the plaintiff from an order of the local master at Belleville, made on Saturday the 17th April, requiring the plaintiff to give particulars of the statement of claim. The action was in the Chancery Division. Notice was given, and the appeal was set down by the clerk of records and writs to be heard on Monday the 26th April, which was Easter Monday and a *dies non juridicus*, and the appeal came on to be heard on Monday the 3rd May.

Neville, for the appellant.

E. Douglas Armour, contra, objected that the notice and setting down for a *dies non* were void, and that if it was to be taken as for the following Monday it was too late, not being within eight days of the order appealed from.

BOYD, C.—It is a convenient practice to set down an appeal in the regular way for a Monday, even if it cannot be heard, but must stand over till the following Monday; inasmuch as it saves the expense of an application to extend the time for bringing on the appeal. Besides, the defendant should have moved to strike out the appeal as improperly set down, if he wished to have the benefit of his objection.

*Objection over-ruled, and appeal allowed
after argument upon the merits.*

See *Williams v. De Boinville*, W. N. 12 June, 1886, p. 114.—*REE*.

GOULD V. BEATTIE.

Slander—Particulars—Examination.

An order for particulars, under the statement of claim in an action of slander, of the names of the persons to whom the alleged slander was spoken, was rescinded because the examination of the plaintiff gave to the defendant all the discovery that he sought to obtain by the order for particulars.

Semble, in actions of slander the practice laid down in *Thornton v. Capstock*, 9 P. R. 535, as to particulars to be furnished should be followed in preference to that prevailing in England.

[May 5, 1886.—*Boyd*, C.]

THIS was an action of slander, the plaintiff charging the defendant with circulating certain vile, obscene, and libellous papers, and representing them to be copies of a letter written by the plaintiff.

Paragraph 4 of the statement of claim was as follows : “ In connection with the said papers, and while circulating the same, the defendant falsely and maliciously spoke and published of the plaintiff to John C. Blacklock and others the following words, that is to say : ‘ Strong suspicion points to Gould ’ (meaning thereby the plaintiff) ‘ as the author of the letter,’ meaning thereby that the plaintiff had written the said vile, obscene, and libellous letter, and was the author of the said letter.”

Paragraph 5 : “ On another occasion, in connection with the said papers, and while circulating the same, the defendant falsely and maliciously spoke and published of the plaintiff to Malcolm McMillan and others the words following, that is to say : ‘ I believe that Gould was the author of it,’ meaning thereby that the plaintiff had written the said letter,” &c.

Paragraph 6 : “ On another occasion, in connection with the said papers, and while circulating the same, the defendant falsely and maliciously spoke and published of the plaintiff to James D. Strong and others the words following, that is to say : ‘ Gould is the author of the letter,’ meaning thereby that the plaintiff had written the said letter,” &c.

The plaintiff appealed from an order of the local master at Milton for particulars under the above paragraphs of the statement of claim.

Fullerton, for the appeal.

Allan Cassels, contra.

BOYD, C.—As to paragraph 4 of the statement of claim the plaintiff in his examination refers to David Wheelihan and James Menzies in connection with Blacklock, who is named in the pleading.

As to the 5th paragraph he says that the others referred to therein (in connection with Malcolm McMillan) are John Simpson, Thos. Moore, and James D. Strong.

As to the 6th paragraph he says the occasion was on Saturday before the election, and that he cannot fix (*i.e.* name) any others except Strong. When he speaks further down in the examination of there being others whose names he declines to give, he refers to others who pressed him to pay money that he owed on account of this alleged slander. This examination was on the 15th April, and about a month after the defence was filed. There was a demand for particulars served on the 24th March by the defendant on the plaintiff, and a summons in pursuance thereof was obtained on the 17th April, which the local judge made absolute, and from which the plaintiff appeals.

The particulars demanded were the names and residences of the persons referred to as "others," and also the *places* where and the *time or times* when the alleged conversations took place with the three persons named "and others." The summons and order are confined to the *names* only of the said persons.

The practice in these cases of slander, under the Ontario Judicature Act, first came up for decision in July, 1883, before Cameron, J., who having premised that the practice did not appear to be very clear, held that the plaintiff (where as here the pleading was general) must give parti-

culars of the time, place, and person, when, where, and to whom the words were spoken : *Thornton v. Capstock*, 9 P. R. 535. Then he proceeds at p. 541 to say: "I do not think it essential for the plaintiff to state all who were present at the time; it will be sufficient to state the person to whom the words were spoken, or if he is not known, or the words were spoken to the plaintiff, then the name of any person who was present or might have heard the words spoken." The statement of claim is here framed so as to give that information which alone this experienced judge thought essential by naming the person to whom the words were uttered.

In March, 1883, the question arose in England in *Bradbury v. Cooper*, 12 Q. B. D. 94, and particulars were then ordered of the persons to whom the words were uttered, but only because the charge was that the defendant had procured another person to utter the slander, and therefore he (the defendant) was not able to tell without particulars where or under what circumstances this other person had uttered the words. But in giving judgment Grove, J., said that if the words had "been uttered by the defendant himself I should have had much doubt whether he could compel the plaintiff to give the particulars asked for. I am not satisfied that the modern practice has been to order particulars of the names of the persons to whom the slanders were uttered. Where the defendant is alleged to have uttered them himself he may be supposed to know to whom he did utter them."

Again in March, 1886, the point came before the same judge, Grove, J., and Mr. Justice Stephen, in *Roselle v. Buchanan*, 16 Q. B. D. 656, in which it was held that the names of such persons should be given though the slander was spoken by the defendant himself. But Grove, J., states that this is because having made inquiry he finds that the modern practice is to order such particulars to be given. He also says: "But for the practice at chambers I think that I should have agreed with the view put forward by the plaintiff's counsel (*i.e.* that a person is not bound to

disclose the evidence he proposes to adduce), because where the defendant himself is alleged to have uttered the words complained of he may be supposed to know to whom they were uttered."

If it were needful for me to decide between these two lines of practice, I should prefer to follow that laid down by Chief Justice Cameron, which is also in accord with the views I endeavoured to express in *Smith v. Greey*, 10 P. R. 482, and 11 P. R. 169. See also *Early v. Smith*, 12 Ir. C. L. R. Appendix xxxv. But in the present case I am of opinion that the examination of the plaintiff gave to the defendant all the discovery that he now seeks to obtain in a more formal way by his order for particulars, and that no good purpose can be served by allowing this order to stand.

The appeal will therefore be allowed, and costs of it to be costs in the cause in any event to the plaintiff.

THOMPSON V. FAIRBAIRN.

Executors—Compensation—Administration—Interest.

Executors claimed compensation in respect of receipts amounting to \$29,000, and of disbursements amounting to \$5,000. All the work of collecting and paying over was done after an order for administration had been made, and was done under the advice of solicitors, and in the more important matters under the direction of the Master. An item introduced on each side of the account was a transfer of mortgage to the plaintiff, amounting to \$4,684.47, which was carried out in pursuance of an arrangement made by the solicitors and sanctioned by the Master. It also appeared that the plaintiff's solicitor collected and handed over to the executors \$2,400, and also made a payment to them of \$10,000 for which he was personally liable.

Held, that although the administration order did not put an end to the functions of the executors, yet it greatly diminished their responsibility, and it did so in this case to an almost vanishing point; and the compensation was reduced from \$1,193 to \$440, nothing being allowed in respect of the item of \$4,684.47, one per cent. in respect of the items of \$2,400 and \$10,000, two and a half per cent. on the balance of the collections, and five per cent. on the disbursements except the transfer.

The executors retained in their hands a sum of \$1,100 to meet claims against the estate, and were not called upon to pay it into Court.

Held, that the amount retained was not unreasonable, and that the executors were not chargeable with interest in respect of it.

[May 5, 1886.—*Boyd*, C.]

THIS was an appeal by the plaintiff in an administration suit from the report of the Master at Walkerton, upon two grounds: (1) that the amount allowed the executors as compensation for their services was too great; (2) that the executors should be charged with interest on moneys retained in their hands.

The Master reported that he had allowed the executors \$1,193 as compensation for their services, being a commission of three and one half per cent. on moneys received and disbursed by them.

The facts appear in the judgment.

W. H. C. Kerr, for the plaintiff.

Hoyles, for the executors.

Re Honsberger, 10 O. R. 521; *Re Fleming*, 11 P. R. 272; *Re Batt*, 9 P. R. 447; *Heron v. Moffatt*, 7 P. R. 438; *Re Babcock*, 8 Gr. 409; *Re Berkeley's Trusts*, 8 P. R. 193, were referred to.

BOYD, C.—The amount received by the executors in all was about \$29,000, and they paid out in all about \$5,000. But of this, one item, which is introduced on each side of the account, was a transfer of mortgage to the plaintiff amounting to \$4,684.47. This was done in pursuance of an arrangement made by the solicitors and sanctioned by the Master, and I do not see that such a transaction forms part of the financial dealings for which the executors should get compensation. It further appears that the solicitor, Mr. Kerr, who was acting for the plaintiff, collected various sums, in all about \$2,400, which were handed over to the executors, and also made one payment of a mortgage, for which he was personally liable, of \$10,000.

If 1 per cent. is allowed on these sums,	
\$2,400 + \$10,000, it equals.....	\$124 00
If 2½ per cent. is allowed on the balance	
after deducting the transfer of mortgage	
item, i.e., \$12,000, it equals	300 00
If 5 per cent. is allowed on the disburse-	
ments, except the transfer, it equals	15 00
	<hr/>
	\$439 00.

If on this basis say \$440 is allowed, that, I think, is, in the special circumstances of this case, sufficient compensation. That which distinguishes this from all the other cases cited (except *Re Honsberger*) is that all these dealings of collecting and paying were after the order for administration had been made. There was no responsibility, therefore, resting upon the executors, as in the other decided cases. If they assumed responsibility it was a voluntary and self-imposed obligation. But in truth they appear to have done very little and to have incurred no risks, as they acted under advice of their solicitors, and in the more important matters, if not in all, under the direction of the Master. I held in *Re Honsberger* that the administration order does not put an end to the functions and character of executors, but it vastly diminishes the responsibility, and it did so in this case to an almost vanishing

point. The compensation should be reduced to the sum of \$440. Upon the other point, I think interest should not be charged against the executors. They do not appear to have been called upon to pay into court, and the amount retained (\$1,100) was not unreasonable, considering the views taken in the cases cited during the argument. But for the disagreement respecting compensation there would have been no claim made on this head.

I give no costs of appeal.

LIDLAW MANUFACTURING COMPANY V. MILLER.

Appeal—Forum—Divisions of High Court.

Appeals from the Master in Chambers may be brought on for hearing before a judge of the High Court sitting in chambers without reference to the Division in which the action is commenced.

[May 4, 1886.—*Armour, J.*]

THIS was an action, for the price of goods sold, brought in the Chancery Division, in which the Master in Chambers, on Friday the 30th April, made an order refusing the defendant's application to change the venue from Guelph to London. The defendant on the same day served notice of appeal from the Master's order, returnable before a judge of the High Court of Justice in chambers on Tuesday, the 4th May, Tuesday being a day on which a judge of the Queen's Bench or Common Pleas Division sits in chambers, and Monday the chambers day in the Chancery Division.

On the return of the notice of motion before *Armour, J.*, a judge of the Queen's Bench Division.

W. H. P. Clement, for the plaintiff, objected that it was contrary to the practice for any one but a judge of the Chancery Division to hear such an appeal as this unless

there was no judge sitting in that division, and the application was urgent. This was not the case here, for the appeal could have been heard by the chancellor, who sat on Monday, special leave being obtained to serve short notice of motion for that day.

Holman, for the defendants.

ARMOUR, J.—The three divisions are not courts, but merely parts of the High Court, which is thus divided for convenience in the distribution of work. There is no reason why I should not hear this short motion in what is really a common law case. I have been recently engaged on circuit in trying actions many of which were of a purely equitable nature, and which were of more importance than this motion. I decide to hear the application.

Objection over-ruled, and order made for change of venue upon terms as to securing the debt.

McCULLOUGH V. SYKES ET AL.

Judgment—Revivor—Statute of Limitations—Scire facias.

Judgment was recovered in 1856. On the 23rd of October, 1869, an order was made by a Judge in Chambers to revive by entering a suggestion on the roll under the C. L. P. Act, and the suggestion was entered on the 22nd January, 1870, but no execution issued after that date. On the 6th December, 1884, an order was made under Rule 255, O. J. A., for leave to the plaintiff to issue execution.

Held, that the entry of a suggestion under the C. L. P. Act was a judgment of the court and gave a new starting point for the Statute of Limitations to run from, and that the period of limitation in the case of judgments in personal actions is twenty years under R. S. O. ch. 61, and not ten years under R. S. O. ch. 128, which relates to judgments as liens on land.

Allan v. McTavish, 2 A. R. 278, and *Boice v. O'Loane*, 3 A. R. 167, commented on and followed.

Quære, per ROSE, J., whether there is any period fixed by the statute beyond which the Court may not have the power to allow execution to be issued.

[January 19, 1885.—*The Master in Chambers.*]

[February 10, 1885.—*Rose, J.*]

A motion by the defendants to set aside an order for leave to issue execution in this action made under the circumstances set out in the judgment of the Master in Chambers.

Harman, for the motion.

George Bell, and *C. E. Jones*, contra.

MR. DALTON, Q.C., MASTER IN CHAMBERS.—The judgment in this case originally in favor of Charles Edward Jones, plaintiff, was entered in the year 1856.

On the 23rd October, 1869, the Hon. Mr. Justice Morrison made the then usual order on summons for the revival of the judgment in the name of the present plaintiff, as executrix of the judgment creditor. The order was that the plaintiff, the executrix of the last will and testament of the judgment creditor, be at liberty to enter a suggestion on the roll of the said judgment, wherein the said judgment creditor obtained judgment for £3,090 10s. 3d. against the defendants on the 28th day of October, A. D. 1856, and

that the said now plaintiff, as executrix as aforesaid, should have execution of the said judgment and issue execution thereon.

That suggestion was entered accordingly on the roll the 22nd day of January, 1870.

The first question that arises then is, was the effect of that order and entry merely to give a right of execution upon an existing judgment, which it did, or did it confer at that date a new right upon the plaintiff? I think it gave a new right.

This practice as to the revival of judgments was introduced by the Common Law Procedure Act, and was meant to be used instead of the proceeding by *scire facias*, I cannot say that it was substituted for the *scire facias*, for I do not understand that the proceeding by *scire facias* was in such case abolished. See secs. 322 to 330 inclusive, Common Law Procedure Act. The entry might be procured, as was done here by a Judge's order upon summons, in cases where the right manifestly appeared, or in any case by writ of revivor. Whichever course was adopted, it stood in the place of the old *scire facias*, and the judgment in the proceeding, it would seem, must have the effect that a judgment in *scire facias* would have had before the Act, for the intention of the statute does not appear to have been to introduce any new legal right, or to interfere with any legal right, but to provide a plain and simple method of practice for effecting that which had heretofore been effected by the rather clumsy old proceeding by *scire facias*, and as no intention is apparent to alter the effect of the revival when accomplished, the result when arrived at, it would seem, must be just the same, whether it be upon a Judge's order, or on a writ of revivor, or in the old way by *scire facias*. In either of the ways it is a judgment of the Court.

Then, what would have been the effect of a revival by *scire facias* before the Common Law Procedure Act? There are two cases which make this plain: *Farran v. Beresford*, 10 Cl. & Fin. 319, and *Farrell v. Gleeson*, 11 Cl. & Fin.

702. These cases decide that the judgment in *scire facias* gives a new right, and is not a mere continuation of a former suit. It was so held in respect of the very objections here, viz: as to the defence of limitation by lapse of time. The statute begins to run then from the time of the entry of judgment in *scire facias*, and so I think it must be in the case of a judgment of revivor, whether it be a judgment entered by Judge's order, or a judgment upon a writ of revivor, and upon pleadings. See *Ex p. Woodall*, 13 Q. B. D. 479.

That date in this case would be the 22nd day of January, 1870, or at any rate not earlier than the date of the Judge's order, the 23rd October, 1869. I suppose the 22nd January, 1870, to be the true time, but it matters not in this case which of the two it may be.

But about fourteen years have run against the last mentioned judgment, and that brings me to another question on this motion, which has been very much debated in this country, and in England, with the result of a very decided difference of opinion on the Bench. It is as to the construction to be put upon sec. 23 of ch. 108, R. S. O., whether the limitation by that section of the right on a judgment to ten years next after a present right to receive the money secured by it has accrued, is applicable only to the lien of that judgment upon land, or whether it applies to the whole right of the judgment creditor by virtue of the judgment, and so in all cases cuts down the twenty years limited by ch. 61 R. S. O., in case of an action on a judgment, to ten years.

There is a direct decision on the point by our Court of Appeal in the case of *Boice v. O'Loane*, 3 A. R. 167, which gives I think the law on the subject, and that I follow. *Allan v. McLavish*, 2 A. R. 278, which is the case of a mortgage on land, is also in effect somewhat similar. The first case decides that the limitation is only confined to ten years in the case of a judgment, in respect of its lien on land. I am not unaware of the cases of *Sutton v. Sutton*, 22 Ch. D. 511 (in the Court of Appeal), and *Fearnside v. Flint*, 22

Ch. D. 579, one the case of a mortgage, the other of a bon collateral to a mortgage, in which the decision is substantially contrary to the decision in *Boice v. O'Loane*. Indeed I have read I think all the recent cases upon the point. Where the question has been so keenly debated and elaborate judgments leading to opposite conclusions on the question have been delivered by eminent Judges, it is unnecessary, and would be indeed quite out of place for me to enter at length upon the general reasoning on the point. I have only to refer to the cases. It will all be found there. The authorities are high on either side, and assuming that upon authority the case is balanced, I may without impropriety, shortly, and it seems to me I ought, to state, if I am to decide, the grounds of the decision I am to give.

I will suppose a person not aware of the recent decisions, to endeavour to inform himself of the law as to the limitation applicable to a judgment by reference to our Revised Statutes. He would there find two chapters, 61 and 108, both enacted at the same time in 1877, and side by side in the statute book. If it occurred to his mind that the chapters were inconsistent in prescribing by one ten years' and by the other twenty years' limitation in the case of a judgment, (for a judgment is, I take it, a specialty under chapter 61), he would be struck by so gross an inconsistency in statutes passed at the same time, and would naturally look closer to see whether the legislation in the two chapters was really on the same subject. And in chapter 61 he would see the right of action on a specialty (which, as I have said, I take a judgment to be) limited generally to twenty years. In chapter 108 he would see the limitation as to a judgment reduced to ten years, in language which might possibly be read as applying to the whole right by virtue of the judgment, and which might with at least equal probability be read as applying to a judgment in so far only as it was a lien upon land. When he looked to the title of this latter chapter (and the title is part of a statute) he would read that it was "An Act for the further limitation of actions and suits relating to real property," and

going a little further to find out what could have been the intention of the Legislature, upon reference to the preamble of the Act (38 Vic. ch. 16 (O.)), which chapter 108 re-enacted, he would see the recital of that preamble in these words :

“Whereas, it is expedient to lessen the time for making entries and distresses, and for bringing actions and suits to recover land or rent in certain cases from forty to twenty years, and certain other cases from twenty to ten years, and in certain other cases from ten to five years, and also to lessen the time for redemption by mortgagors, and for recovery of dower, and of money charged on lands or on rent, and of legacies, and also to provide for cases of money and legacies charged on land or on rent secured by express trust, according to the provisions hereinafter contained respectively relating thereto.”

That is the whole of it.

Probably, on seeing this, he might think that the two chapters were not inconsistent with each other : that they might both stand together without any contradiction ; and that they did not, in truth, deal with the same subject. But how much more would he be of that opinion when he examined the legal decisions upon these two chapters as they existed in 1877, when these chapters were re-enacted ? That is a fair way of looking for the intention of the Legislature. He would find that in those decisions chapter 108 was then held to relate to the lien upon land, and chapter 61 to the personal action only. I refer to *Hunter v. Nockolds*, 1 McN. & G. 640, 14 Jur. 256 and the cases cited in that case ; and to the cases following it, referred to in the judgment of the late learned Chief Justice of the Court of Appeal in *Boice v. O'Loane*.

Such is the law laid down in *Boice v. O'Loane*.

I think that the judgment in this case is not barred, and that my order reviving the judgment against the representatives of the defendants is consequently right.

As to the part of this motion which I treat of now, I order that the representatives of the defendants pay the costs to the judgment creditor.

The defendants appealed to a Judge in chambers.

C. Moss, Q. C., for the appeal.

C. E. Jones, contra.

ROSE, J.—The facts appear in the judgment of the learned Master whose decision is appealed from.

It will be well to see if the Statute of Limitations applies to prevent an order for leave to issue execution being made after the expiry of twenty years, or any other period of time.

A proceeding by *scire facias* has been determined to be an action; see cases collected in *Gwatkin v. Harrison*, 36 U. C. R. 478; *Page v. Austin*, 26 C. P. 110.* By the 3 & 4 Wm. IV., ch. 27, sec. 40, (Imp.) after the 31st day of December 1833, “no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land,” &c.

This is similar to sec. 23, ch. 108, R. S. O., which by *Boice v. O’Loane*, 3 A. R. 167, was held to be confined to judgment forming a charge upon lands. The period of limitation in our Act is ten, and not twenty years, as in 3 & 4 Wm. IV.

It would seem clear that as to such a judgment no proceeding in *scire facias* could be taken after the lapse of ten years, or by suggestion. See *Casper v. Keachie*, 41 U. C. R. 599.

By the Common Law Procedure Act, 1852, the practice was changed, and instead of requiring parties to proceed by *scire facias*, an option was given of obtaining a Judge’s order to enter a suggestion on the roll and thereupon issue execution. By Rule 356, O. J. A., the practice seems further changed so as to render a suggestion unnecessary, the party entitled to issue execution being required only to obtain an order for leave to issue execution. These proceedings under

* As to the nature and effect of proceedings by *sci. fa.* see *Brice v. Munro*, 12 A. R. 453.—REP.

this rule are no doubt covered by the words of sec. 23, ch. 108, above quoted.

The statute which by *Boice v. O'Loane* was held to apply to judgments generally, is not the above but ch. 61 R. S. O.

The words are, section 1. The *actions* hereinafter mentioned shall be commenced and sued within the times respectively hereinafter mentioned, and not after, that is to say : (a) Actions of debt for rent, upon an indenture of demise ; (b) Actions of covenant or debt, upon a bond, or other specialty ; (c) Actions of debt or *scire facias* upon a recognizance. A judgment has been determined to be a specialty within the meaning of sub-sec. (b).

It may be that *scire facias*, or proceedings by writ of revivor would fall within the actions upon a specialty referred to in sub-sec. (b), but unless proceedings by way of suggestion, or by order without suggestion by rule 356, are actions, then I know of no statutory limitation preventing the granting of an order for leave to enter a suggestion, or to issue execution at any time even exceeding twenty years.

When rule 355, O. J. A., is looked at, we find that as between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment. This is similar in terms to sec. 128 of the Common Law Procedure Act, 1852 (sec. 322, ch. 50, R. S. O.). It is only where the six years have expired, or where any change has taken place by death or otherwise in the parties entitled or liable to execution, that leave has to be applied for.

It will be observed that the statute thus limits the term within which execution may be issued without an order, but not the term within which it may be issued upon an order.

It will be remembered that *Boice v. O'Loane* was an action on a judgment, and there it was held that twenty years was the period of limitation.

It seems to me there is no period fixed by the statute beyond which the Court may not have the power to allow execution to be issued.

In *Sutton v. Sutton*, 22 Ch. D. 511, the Master of the Rolls, Sir George Jessel, points out that apart from the statute, after the expiry of twenty years, in certain cases the Courts recognized the presumption of payment, and this rule or custom would no doubt operate so as to prevent an order being granted without evidence rebutting the presumption. In this case, however, when the order granting leave to enter the suggestion in 1870 was made, the defendants were served with notice, and also shewed cause. Therefore only fourteen years have elapsed since evidence was thus obtained of the non-payment of the debt.

I have much considered the argument advanced by Mr. Moss in favour of his appeal, especially the report of the Commissioners upon which the Common Law Procedure Act was brought into force. Had I not been much influenced by the argument in the very carefully prepared judgment of the learned Master I might have yielded to the appellant's contention that a suggestion entered pursuant to leave given by a Judge did not give a new right, as a judgment upon *scire facias* has been held to give, especially having in view the language of the C. L. P. Act, secs. 323, *et seq.*, where we find that the leave is to issue execution *upon the judgment*. I cannot say my mind is free from doubt, on the contrary I doubt much, "but gravely to doubt, is to affirm," and I cannot therefore grant the appellant's motion, apart from the question I have discussed as to the statute of limitations applying.

I was urged to direct an issue so as to enable the defendant to carry the case to the Supreme Court. If I had any evidence before me to lead me to think there were any merits in the defendant's favour I would vary the order in that respect. There is no such evidence.

This appeal must be dismissed, with costs to the plaintiff in the cause in any event if the matter is further proceeded with. If not these executions may issue on this order after the expiration of fifteen days.

Upon an affidavit shewing payment the defendant may apply for an issue and this dismissal is without prejudice to such application.

GEORGE T. SMITH COMPANY V. GREY ET AL.

Examination—Party resident out of jurisdiction—Conduct money—Objections.

The president of the plaintiffs lived in the U. S., but being in Toronto, he was there subpoenaed on the 22nd April to attend on the 28th April, for examination for discovery before a special examiner at Toronto. He was paid \$1, and made no objection as to the amount, nor did he object that he was prevented by engagements from attending, but he failed to attend.

Held, that he should have attended on the day appointed, and that the fact that there were then pending against him, at the instance of a stranger to the action, proceedings for perjury, which might affect some point in controversy, though it might be a reason for his refusing to answer any question on this point, was not a reason for refusing to attend at all; and he was ordered to attend at his own expense.

Bolckow v. Foster, 7 P. R. 388, distinguished.

[June 29, 1886.—*Boyd*, C.]

THIS was an application, originally made before the Master in Chambers and by him referred to a judge, for an order to compel the president of the plaintiffs' company to attend at Toronto at his own expense to be examined for discovery in the action, and in default to postpone the trial. The president lived in Jackson, Mich., but being in Toronto, he was served on the 22nd April, 1886, with an appointment and subpoena for his examination before a special examiner at Toronto on the 28th April, and paid one dollar conduct money. The president failed to attend, and this motion was accordingly made.

H. D. Gamble, for the motion.

Arnoldi, contra.

BOYD, C.—*Bolckow v. Foster*, 7 P. R. 388, would be in point if this application was to dismiss the plaintiff's action for default in attending to be examined. But what is asked is, that the president of the plaintiffs, having made default in attending to be examined, may now attend at his own expense. The only point between the parties in substance is as to the expense of attending, as the president is resident in the United States, because he offers to attend

for the purpose of examination if his expenses are paid. But being in Toronto he was subpoenaed on 22nd April to attend on the 28th of April for examination. He was paid \$1 and made no objection as to the amount, nor did he make any objection that he was prevented by his other engagements from being present on that day. Objection was made by his solicitor to his being examined because there was then pending against him at the instance of a stranger to this action proceedings for perjury, which might affect some point in controversy in this action. That would be perhaps a good reason for his refusing to answer any question on this point, but not a reason for his refusing point blank to attend at all. He should have attended on the 28th and made objection to answering if so advised. He should now therefore attend at his own expense, and in default the trial should be postponed till he does attend. I refer to the practice as laid down in 1 *Paterson Com. Law*, pp. 254, 255 and the cases of *Dixon v. Lee*, 1 C. M. & R. 645; *Goff v. Mills*, 2 D. & L. 23; *Deadman v. Ewen*, 27 U. C. R. 176; and *Hempston v. Humphreys*, Ir. R. 1 C. L. 271. The costs of this application in any event to the defendants.

CAMPBELL V. JAMES.

Joinder of causes of action—Rule 116, O. J. A.

Where the writ of summons was indorsed with a claim for the recovery of land and for mesne profits, but the statement of claim asked specific performance of the contract by the defendant to buy the land from the plaintiff, and in the event of specific performance not being decreed, possession, &c., and no order had been obtained for leave to join another cause of action with a claim for the recovery of land, as required by rule 116, O. J. A., and a motion was made to set aside the writ of summons and statement of claim, or one of them.

Held, that the causes of action were improperly joined in the statement of claim without leave, but inasmuch as the two causes of action could not conveniently be prosecuted separately, leave was given to amend the writ by adding a claim for specific performance, or the statement of claim by striking out such claim, at the plaintiff's option.

[May 27, 1886.—*The Master in Chambers.*]

THE plaintiff issued his writ of summons indorsed for the recovery of possession of land and for mesne profits.

The statement of claim alleged that a verbal contract had been made between the plaintiff and defendant for the sale by the plaintiff to the defendant of the land in question, under which the defendant was let into possession of the land, made improvements, and paid part of the purchase money. It then went on to allege that the plaintiff feared he should not be able to enforce the contract specifically by reason of its not being in writing, offering, if the defendant were willing, to carry out the contract, and prayed that the contract might be specifically performed if the defendant were willing, and, in the event of his not being entitled to specific performance, for possession of the lands and mesne profits.

The defendant moved to set aside the writ and statement of claim, or one of them, on the ground that no leave had been obtained to join causes of action, and that leave was necessary under Rule 116, O. J. A.

Shepley, for the motion.

Hoyles, contra.

THE MASTER IN CHAMBERS held that there was a joinder of another cause of action with a claim for the recovery of land, in contravention of Rule 116, and made an order allowing the plaintiff to amend his statement of claim by striking out the claim for specific performance, or to amend the writ of summons by adding such a claim, holding that there was a special circumstance which justified him in granting at this stage leave to join causes of action, which had not been applied for before the commencement of the suit,—viz.: that the two causes of action could not be conveniently prosecuted separately.

MCNAB V. OPPENHEIMER.

Sheriff—Poundage—Arrest.

A sheriff upon arresting a judgment debtor under a *ca. sa.* thereby becomes at once entitled as against the execution creditor to full poundage on the amount of the execution.

[June 11, 1886.—*Galt, J.*]

THE defendant was arrested by the sheriff of the County of York, upon a writ of *capias ad satisfaciendum*, and shortly afterward effected some arrangement with the plaintiff in virtue of which the plaintiff consented to his being permitted to go at large. What the terms of the arrangement were did not appear, but no money in any way passed through the hands of the sheriff, and it was admitted that the plaintiff had not, by means of the arrest or any arrangement with defendant, received anything to apply upon his judgment debt.

After the defendant's discharge from custody the sheriff rendered to plaintiff's solicitor a bill of his costs, fees, poundage, and expenses of execution, in which there was an item for poundage computed at the rate of 6 per cent. upon the full amount of the judgment debt, interest, and costs. Upon taxation, the taxing officer at Toronto altogether disallowed this item of poundage.

Aylesworth, for the sheriff, appealed from the taxation, citing *Morris v. Boulton*, 2 C. L. Chamb. R. 60; *Leeming v. Hagerman*, 5 O. S. 38; *Corbett v. McKenzie*, 6 U. C. R. 605; Imp. Stat. 5 & 6 Vic. ch. 98, sec. 31.

Kappele, for the execution creditor, contended that sheriffs were not now liable in debt upon a debtor's escape, but only for the actual damage suffered, and that it would be unreasonable to hold a sheriff entitled to full poundage on the mere arrest of the debtor, though nothing should be made by the arrest, and though the execution might be for thousands of dollars. He referred to R. S. O. ch. 67, sec. 33, and the tariff of sheriff's costs.

GALT, J. (after reserving judgment) allowed the appeal with costs, holding that the sheriff by the mere arrest of the debtor in execution became thereupon entitled as of right to his full poundage. There remained nothing after the arrest which the sheriff could do towards realizing the amount of the debt. Whether the debtor afterwards regained his liberty or remained in close custody was not anything the sheriff could control, or with which he was concerned.

In the absence of legislation the sheriff was, under circumstances such as appeared here, entitled to be paid his poundage to the same extent exactly as though he had made and paid over to the execution creditor the whole of his claim upon the judgment.

MULKINS V. CLARKE.

Sale—Vendor's solicitor—Deposit—Default—Responsibility of Vendor.

Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale.

Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency.

[May 31, 1886.—*Proudfoot, J.*]

THE lands in question were sold under the direction of the court in a partition matter, and the vendor's (plaintiff's) solicitor received ten per cent. of the purchase money at the time of sale under the usual conditions of sale, which read, "a deposit of ten per cent. of the purchase money is to be paid to the vendor or his solicitor at the time of sale." The solicitor neglected to pay the deposit into court, and an order was made striking him off the rolls for his default.

Watson, for the plaintiff, now moved for an order for distribution of the moneys in court.

Harcourt, for the official guardian, submitted that the infants should not be losers by the default of the plaintiff's solicitor.

PROUDFOOT, J., held that the default of the solicitor was the default of the plaintiff, and ordered that the shares of the parties, other than the plaintiff, should be paid in full, and that the plaintiff's share alone should be charged with the deficiency.

COCHRANE MANUFACTURING COMPANY V. LAMON.

Arrest—Ca. sa.—Discharge—Powers of local Judge—Rule 420, O. J. A.

A local Judge of the High Court has no power to order the discharge of a defendant held in custody under a *ca. sa.* issued out of the High Court of Justice.

[June 25, 1886.—*Galt, J.*]

THIS was an appeal by the plaintiffs from an order made by the local Judge of the county of Middlesex for the discharge of the defendant, who was in custody under a writ of *ca. sa.* issued out of the Queen's Bench Division.

Aylesworth, for the appellants.

W. R. Meredith, Q. C., for the respondent.

GALT, J.—The only question is, whether the local Judge has authority, under rule 420 of the Judicature Act, to make such an order. The learned Judge in stating the point says: "The marginal rule 420 gives the County Judge the same powers as those possessed by the Master in Chambers, and the latter official has the same powers as the Clerk of the Crown and Pleas, who was precluded from disposing of matters relating to the liberty of the subject. It is accordingly urged that I have no authority to deal with this application because it relates to the liberty of the subject. I think this expression refers to operations tending to *restrict* the liberty of the subject, and not to an application like this." If the learned Judge is correct in this view, it appears to me the reasoning would equally apply to cases of *habeas corpus*, which unquestionably are in all cases intended to relieve the defendant and restore him to liberty; but it has never been suggested that the Master in Chambers has jurisdiction in such cases. The Master in Chambers has no power to issue even a *capias ad respondendum*. It is true the County Judge can do so, but this is under an express statutory provision, sec. 5, ch.

67, R. S. O. The case of *Wheatly v. Sharp*, 8 P. R. 189, referred to by the learned Judge, appears to me to indicate what the opinion of Cameron, J., is on this subject, and is against the power of the Master in Chambers to interfere in cases where the defendant is in custody. That was a case in which the power of the Master in Chambers to order payment of a weekly allowance was incidentally before the Court. Cameron, J., (p. 192), says: "I think it was within the power of the Clerk of the Crown in Chambers to make an order for the payment of the weekly allowance in a case in which such order could be legally made, *as it in no way relates to the liberty of the subject.*"

On referring to the rule of Court made 9th February, 1870, defining the powers of the Clerk of the Crown and Pleas of the Court of Queen's Bench, it will be found that he has authority to transact all such business as is now done, transacted, or exercised by any Judge of the said Courts sitting in Chambers, except in respect of matters "relating to the liberty of the subject," and to certain other excepted matters. Then follows this order: "In all such excepted matters *not being matters relating to the liberty of the subject* the said clerk may issue a summons returnable before a Judge." It is therefore plain that in cases relating to the liberty of the subject he had no authority whatever.

By rule 420 (a) it is expressly declared that "the said officer shall *not* have authority or jurisdiction in respect of the matters excepted in regard to the Clerk of the Crown and Pleas of the Court of Queen's Bench by the rules of the Judges of the Courts of Queen's Bench and Common Pleas of Hilary Term, 1870, or in respect of the matters excepted in regard to the Referee by the 560th of the orders of the Court of Chancery." We have here a distinct and positive declaration that in all matters excepted in the rule of Court of Hilary Term, or in the 560th order of the Court of Chancery, the Master in Chambers shall have no jurisdiction. This disposes of the argument of Mr. Meredith that the Referee in Chambers had a larger

jurisdiction than that of the Clerk of the Crown and Pleas, because it is expressly declared that the powers of those officers shall be vested in the Master in Chambers, and then follows the declaration that that officer shall not have authority or jurisdiction in respect of the matters excepted in regard to either the one office or the other.

This appeal must be allowed.

HARE V. CAWTHROPE.

Notice of trial—Joinder—Close of pleadings—Counter-claim.

The plaintiff delivered a simple joinder of issue upon the statement of defence and counter-claim.

Held, that this closed the pleadings, and that notice of trial served with it was regular.

[May 25, 1886.—*The Common Pleas Division.*]

THIS was an appeal by the defendants from an order of Armour, J., in Chambers, reversing an order of the local Judge at London which set aside the joinder of issue and notice of trial served by the plaintiff. The defendant having filed a statement of defence and counter-claim, the plaintiff filed a reply which simply stated that the plaintiff joined issue upon the defence and counter-claim, and with it served notice of trial.

Shepley, for the defendant. The cause was not at issue, and the notice of trial was irregular. A simple joinder of issue is not a proper defence to a counter-claim under the Judicature Act. Even if it is a proper defence, the plaintiff has the right to amend or reply, and the pleadings cannot be said to be closed until the time within which such right must be exercised has expired: Rules 176, 178, 179, O. J. A.; *Benbow v. Low*, 13 Ch. D. 553.

Aylesworth, for the plaintiff contra.

ROSE, J.—Section 117 of the Common Law Procedure Act provides that “Either party may plead in answer to the plea or subsequent pleading of his adversary that he joins issue thereon, which joinder of issue may be as follows, or to the like effect :

The plaintiff joins issue on the defendant’s first (&c., specifying which or what part) plea.

The defendant joins issue upon the plaintiff’s replication to the first (&c., specifying which) plea.

And such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon; and in all cases where the plaintiff’s pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant.”

Order 21, rule 176, O. J. A., differs essentially in its language from the above section. It reads:

“As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto * * the pleadings as between such parties shall be deemed to be closed without any joinder of issue being pleaded by any or either party.”

In the interpretation clause, sec. 91 of the Act, “pleading” is said to “include the statement in writing of the claim or demand of any plaintiff.”

It seems clear therefore that a defendant may, under order 21, join issue upon a statement of claim without adding any further or other pleading thereto.

The old rules and names of pleadings have been abolished by the Judicature Act. Words therefore in a statement of claim or defence must be taken in their ordinary meaning.

If in ordinary conversation one man says to another, “I join issue on that statement,” he would be well understood to deny its correctness.

If a defendant, in his statement of defence, says, “I deny the truth of the statement in the statement of claim,” would he use language having any different meaning than if he said, “I join issue on the plaintiff’s statement of claim?”

While rule 148 renders it unnecessary to introduce any allegation for the mere purpose of preventing an implied admission, yet some sort of a pleading must be delivered by a defendant to prevent final judgment under rule 204, or other proceedings under subsequent rules.

I see no reason, therefore, why a defendant may not use the words "join issue" as well as any other words which put the plaintiff's statements of facts in issue.

The effect would be that by the use of such a form of pleadings they would be closed under rule 176, and there would be no necessity of the plaintiff pleading any "joinder of issue."

A counter-claim has been defined as a "pleading:" see *MacLennan's* Judicature Act, 2nd ed., p. 280, referring to *Haynes's* Chancery Practice, p. 77, and *Treksen v. Bray*, 45 L. J. Ch. 115.

By rule 127, a "counter-claim shall have the same effect as the statement of claim in a cross action."

If a plaintiff has no answer to make to a counter-claim than simply to deny the statements of fact upon which it is based, he may, as it seems to me, for the reasons above stated, simply join issue upon it, when, by analogy, under rule 176, the pleadings are at once closed, and under rule 255 notice of trial may be given.

This is a convenient practice, and would prevent a plaintiff being thrown over Court in many cases, and is in conformity to the former practice which allowed issue to be taken on a plea of set-off: see sec. 113, C. L. P. Act.

As such a pleading is merely a denial of the truth of the statements in the preceding pleading, no injustice results from the right to amend ceasing by such closing of the pleadings, as the necessity of amending would exist by reason of negligence in the preparation of the pleading to be amended, or some cause other than the simple denial.

For these reasons, I agree that the order appealed from was well made, and must be affirmed.

CAMERON, C.J., and GALT, J., concurred.

Appeal dismissed, with costs.

CONMEE ET AL. V. CANADIAN PACIFIC RAILWAY COMPANY.

*Staying trial—Interlocutory appeal—Supreme Court Act, 1879, sec. 9—
O. J. A. sec. 43.*

The trial of the action was stayed pending an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal upon a question arising in the action as to the method of trial of the issues in this and a cross-action.

[May 31, 1886.—*The Master in Chambers.*]
[June 4, 1886.—*Galt, J.*]

A MOTION by the defendants to stay proceedings pending an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal (12 A. R. 744) upon the question of filing a jury notice and staying one of two cross-actions.

R. M. Wells, for the motion.

Osler, Q.C., contra.

THE MASTER IN CHAMBERS.—The appeal bond, the security for the appeal to the Supreme Court, has been allowed, and the case on appeal settled, by Mr. Justice Patterson. The security has been filed and the appeal set down at Ottawa with the Registrar of the Supreme Court, but no leave to appeal has been given either by the Court of Appeal or the Supreme Court, and the allowance of the security by Mr. Justice Patterson was made on the bond subject to the appellants' having the right, or obtaining leave, to appeal, no leave having been granted by the Court of Appeal.

It is objected by the respondents, the plaintiffs, that there can be no appeal to the Supreme Court as there is no final judgment. Sec. 43 of the Judicature Act, it is contended, prevents an appeal, as there is here no measure of money value that can be placed upon the matter in controversy on the appeal, the appeal being indeed in respect of the manner of procedure in an action which is still depending undetermined in the court of first

instance, no recovery of judgment having been had by either party in the last mentioned court.

The appellants, the defendants, rely upon section 9 of the Supreme Court Act of 1879, which is in these words :

“ The words ‘ final judgment ’ in this Act contained, mean judgment, rule, order, or decision, whereby the action, suit, cause, matter, or other judicial proceeding is finally determined and concluded.”

I have been referred to the Supreme Court Reports, vol. 4, page 608, to *Chevalier v. Cuveillier*, as a case decided by the Supreme Court under that section. It was an action in the Superior Court of Quebec. Some of the defendants had demurred to a part of the plaintiff's claim, and the Superior Court of Quebec sustained the demurrer. On appeal to the Court of Queen's Bench (L. C.) on its appeal side, that judgment was affirmed. The plaintiff thereupon appealed to the Supreme Court, and it was held that, as the judgment of the Court of Queen's Bench (L. C.), the highest court of last resort in the Province, finally put an end to the appeal, which was a judicial proceeding within the above sec. 9 ; therefore from that judgment of the Appeal Court an appeal lay to the Supreme Court. In that case there was no final judgment in the cause in the court of first instance. The litigation of the case was yet open. It was, as it appears to me, as far as the present purpose is concerned, precisely like this case, and the decision therefore shows that the present judgment of our Court of Appeal is appealable to the Supreme Court unless sec. 43 of the Judicature Act be a bar.

As to that there is a case of *Forrestal v. McDonald*, which has been decided by the Supreme Court. The case went to Ottawa from Ontario, and the amount in question was \$576. It is not reported in the regular reports, but our Law Times, vol. 3, p. 21, gives the following account of it :

“ A motion for leave to appeal to the Supreme Court of Canada from the Court of Appeal (Ont.) under sec. 43 of the Judicature Act, had been refused by the latter court. A motion was then made to Mr. Justice Fournier

for leave to appeal, who referred it to the full court. The amount in question was \$576.30. The Court while doubting the constitutionality of sec. 43 of the Judicature Act, gave leave to the applicant to give security for the proposed appeal, counsel for the applicant abandoning the motion for leave to appeal."

This would seem, from this short note, to be really a decision in point, and in 18 C. L. J. 421, the rule made by the Supreme Court is given verbatim. The report there is a little more full than in the Law Times. It substantially agrees, however. The Supreme Court, so far as I can judge, treats the appeal as pending without any leave. Without saying anything as to its constitutionality, it seems to me that the 43rd section of the Judicature Act, by its limitation of the amount in money, either does not apply at all where the final judgment appealed against is one given by our Court of Appeal in a case where the proceedings in the cause are yet open, (as for instance the present judgment), no final judgment having been given in the action by the original court below, or else that it must mean that the subject of the action shall be open to enquiry in such case, that it may be seen what the appeal in reality affects—in fact, that the words "matters in controversy on the appeal" must of necessity refer, as far as a money value is attributed, to the value of the subject of the suit, and not to the particular question of law that may happen to be in appeal.

The matters in controversy on the appeal here, are, otherwise, matters of law as to the true method of conducting the litigation, and no numbered money value can possibly be fixed upon them, but if you look below to the subject of the suit, it is seen that the decision will affect rights on claims of the parties amounting to about three-quarters of a million of dollars. I must say, however, that it seems to me the better view that sec. 43 of the Judicature Act does not apply at all except where there has been a final judgment in the cause in the court of first instance—in fact, a recovery in the suit either decreed or refused.

The case of *Chevalier v. Cuvillier*, though decided in November, 1879, was not reported till 1881. It is not noted in either of our hand-books on the Judicature Act, and it is not likely that it could have been in view when clause 43 was drawn.

I think I must regard it that there is a pending appeal to the Supreme Court properly constituted.

Then as to the stay of proceedings, it may be there is something of discretion as to this. The case of *McDonald v. Murray*, 9 P. R. 464, was, I think, well decided; but it really has no bearing upon this case. There was much fear on the plaintiff's part in that case that delay would occasion the loss of the whole subject of the suit, a large amount, and the refusal to stay the second trial could but occasion the loss of the cost of a trial. The stay was refused, because nothing was in question on the motion but the costs of a trial.

When an appeal is allowed it is with the purpose that the court appealed to may decide the rights of the parties in the suit appealed. It is not merely or principally for the purpose of having decided one or more abstract propositions of law. The main purpose is a practical one: that the rights of the parties in the suit may be determined and enforced by the proper tribunal. The matters of appeal here are the manner in which this suit shall be tried. Both parties seem by their words and actions to consider that point important, and it is important.

Then if the law give the defendants this appeal, would it not be inconsistent, and indeed unaccountable, to allow the plaintiffs to force down this case for trial under the present decision, in the face of the defendants' appeal and against their will, before it is possible that there can be a decision of the court to which the defendants have appealed? The cases that have been cited are ample authority for the stay that the defendants seek, but they must proceed with their appeal as fast as the practice of the Supreme Court will permit. The offers of reference of all matters that I have heard read make it appear to me

that the defendants do not desire to delay the plaintiffs, as I have heard attributed to the defendants.

Order made staying proceedings.

From this order the plaintiffs appealed to a Judge in Chambers, the same counsel appearing.

GALT, J.—This is an appeal by the plaintiffs from an order of the Master in Chambers staying proceedings in the action until an appeal which is now pending in the Supreme Court is decided. It appears there were two actions between the parties. The present one in the Queen's Bench Division in which the plaintiffs are complainants. The second in the Chancery Division in which the company are plaintiffs and Connée and another defendants. There were several interlocutory proceedings in each suit which it is unnecessary to set forth. These came before the Court of Appeal which gave the judgment which is now before the Supreme Court. One portion of the judgment is, "that an order be granted in the said action (that in the Queen's Bench) staying the said secondly above mentioned action (that in the Chancery Division), the plaintiffs therein to set up the matters claimed therein by way of counter-claim in the said firstly above mentioned action, and the said causes to proceed to trial in the firstly above mentioned action of which the plaintiffs are to have the conduct." This is the question now before the Supreme Court, and, until it is decided, I do not think it competent for the plaintiff to take any further proceedings. For this reason, in addition to those given by the learned Master, I think this appeal should be dismissed, with costs.

The plaintiffs subsequently appealed to the Queen's Bench Divisional Court (Wilson, C. J., and O'Connor, J.), the appeal being heard on the 10th June, 1886. On the 12th June the Court announced that there was no judgment, the two judges differing in their views.

RE MONTEITH—MERCHANTS BANK V. MONTEITH.

Costs—Appeal—Administrator—Creditors—Rule 544, O. J. A.

Costs of appeals are not carried by the words “costs of suit as between solicitor and client,” but require to be specially mentioned in the order for taxation.

The administrator is a necessary party to an administration suit, and as such, should get his general bill of costs incurred in the ordinary proceedings in which he took part; but where an estate is insolvent, the creditors are the persons really interested in the litigation, and it is for them and not for the administrator, to take active steps by way of appeal to reduce the claims of secured creditors. The administrator is entitled to attend upon such appeals, and to tax a watching brief, but not such costs as if he were the principal litigant.

An appeal lies to a Judge in Chambers from the decision of the Master in Chambers, under Rule 544, O. J. A., upon appeal from a pending taxation.

[June 12, 1886.—*Boyd, C.*]

THIS was an administration suit, in which there was a reference to the Master in Ordinary from whose rulings there were several appeals on behalf of the defendant Pritchard, the administrator, and of the unsecured creditors, as against the plaintiffs and the other secured creditors of the intestate. (See 10 P. R. 458, 475.) By the judgment pronounced by Boyd, C., on further directions, it was ordered that the defendant Pritchard should have his costs as between solicitor and client out of the estate, no mention being made of that defendant’s costs of the appeals, although the judgment provided for the unsecured creditors’ costs of the appeals. The taxing officer refused to tax to the defendant Pritchard his costs of the different appeals, and the latter therefore, under rule 544, O. J. A., appealed to the Master in Chambers pending the taxation.

The Master allowed the appeal, holding that the defendant was entitled to his costs of the appeals from the Master in Ordinary.

The creditors appealed from the decision of the Master in Chambers.

Rae, for the plaintiffs and the other secured creditors.

J. A. Paterson, for the unsecured creditors.

MacGregor, for the defendant Pritchard, objected that an appeal did not lie from a decision of the Master on appeal from a pending taxation under rule 544.

BOYD, C., held that the appeal lay.

The appeal was then argued on the merits.

BOYD, C.—When I gave judgment on further directions upon the questions, I had in my mind, and I referred to the decision in *Re Robertson*, 24 Gr. 555. That shews that when an estate is insolvent the creditors are the persons really interested in the litigation. It was for them to take active steps by way of appeal to reduce the claims of the secured creditors, and not for the administrator so to do. If the administrator chooses to appeal, it must depend on circumstances to what extent he should get the costs of these appeals. He need not have actively intervened in this action at all, because those really interested, the secured and the unsecured creditors, were quite able to protect themselves. He was a necessary party, and as such should get his general bill of costs incurred in the ordinary proceedings in which he took part, but having discharged his duty by bringing the matters before the Master, he was absolved from seeking to obtain a reversal of that judgment at the expense of the small fund which is now in hand. See 24 Gr. p. 558.

I think the judgment on further directions is correctly drawn up to carry out this view; while costs of appeals are given to the others, that is not so as to the administrator Pritchard; and it is the general rule that costs of appeals are not carried by the words "costs of suit as between solicitor and client," but require to be specially mentioned in the order for taxation: *Agabeg v. Hartwell*, 5 Beav. 271. The administrator is entitled to attend upon the different appeals and be taxed a watching brief, but not such costs therein as if he were the chief litigant. As in *Swale v. Milner*, 6 Sim. 572, the fund is insufficient,

and all parties' costs will have to abate ratably, and the administrator has, in the circumstances of this controversy, no right to preferential payment.

As explained to me during the argument, it appears that the taxing officer was right in his proceedings, and I think the Master on appeal should not have interfered. I allow the appeal from the Master in Chambers and vacate his order, with costs to be added to the appellant's bill of costs herein.

BROWN V. COUSINEAUX.

Adding parties—Rule 109, O. J. A.—Pleading.

In an action for the price of goods sold, C., to whom the defendant had paid the price of the goods, believing him and not the plaintiff to have the title thereto, and J. C. F. and A. F., who were charged by C. with having fraudulently obtained possession of the goods and made a pretended sale of them to the plaintiff, were added as defendants under Rule 109, O. J. A., with a direction that C. should in his pleading state his case against J. C. F. and A. F., and that they should be at liberty to reply.

[May 22, 1886.—*The Master in Chambers.*]

[May 31, 1886.—*Proudfoot, J.*]

THIS action arose out of an assignment of his stock-in-trade made for the benefit of creditors by Arthur Farley, a trader, to Paul Campbell, as trustee. Before the assignment a part of the stock-in-trade was removed by J. C. Farley and Ann Farley, the son and wife of the assignor, and credit was given in the assignor's books for the value of the goods so removed as against claims of J. C. Farley and Ann Farley.

After the assignment Campbell claimed the goods so removed, brought an action against J. C. and Ann Farley, and obtained an *ex parte* injunction restraining them from interfering with, selling, or removing the goods. Upon a motion being made to continue this injunction a settlement was arrived at, and its terms embodied in an order of the

Court, under which the Farleys received \$1,250 from Campbell, and delivered a quantity of goods to him. Campbell, however, ascertained that all the goods had not been delivered, contrary to the agreement and order, but that in fact a portion of the goods was in the possession of Brown, the plaintiff. Brown, who claimed to have purchased these goods from the Farleys prior to the injunction, delivered them to Cousineaux, the defendant, under an agreement for sale, but, before the purchase money was paid to Brown, Campbell intervened, and obtained from Cousineaux the price of the goods, agreeing to indemnify Cousineaux against any claim on the part of Brown. Brown then brought this action for the price of the goods. Cousineaux set up as a defence that he paid Campbell for the goods, believing him to have the title to them.

A motion was now made on behalf of Cousineaux and Campbell, upon affidavits setting out the facts as above, and charging fraud on the part of the Farleys, and that the sale to Brown was only a pretended one, for an order adding Campbell and J. C. and Ann Farley as parties defendant to the action.

Shepley, for the motion.

MacGregor, for the plaintiff.

No one appeared for the Farleys, who were notified.

THE MASTER IN CHAMBERS.—The question which I have to determine is a nice one, and I have had doubts as to the joining of the Farleys as parties.

I conclude that I should join them under rule 109.

First as to Campbell, I think he has a right to be added, as he desires it, as assignee. He, as the assignee, has the exclusive right to appear in the interest of the creditors. See sec. 7 of the Assignment Act of 1885. If the plaintiff has an honest case it cannot hurt him. The assignee is not bound to leave the defence in the hands of the present defendant.

Then as to the Farleys, I think they should be added. There is a difficulty in calling upon a fourth party. See the cases cited in *MacLennan's* Jud. Act, 2nd ed. p. 259, notes, where indemnity to the third party is the matter sought. I should think, were I driven to decide, that a fourth party can be called on for indemnity merely. But in the present position it is better to act under Rule 109.

Recollect what it is that is to be tried: a suggested fraud of a very ill nature, for which there is certainly plausible evidence, is the real matter. Campbell may fail, that is, the defendant, who is really Campbell, may fail for one of two reasons. 1. Because, although the fraud be proved as against the Farleys, yet Brown, the plaintiff, may succeed if he can shew that he was a purchaser of the goods for value without notice. 2. But Campbell might also fail because the Farleys had and gave the plaintiff a good title. In the one case Campbell should be indemnified by the Farleys, in the other he should not.

Then when it is considered how important it is in examining into a question of fraud that all parties concerned in it should be before the court, I think it is necessary to add the Farleys under Rule 109. It is better than to leave it to their choice to come in under Rule 108.

I can take care at the same time to make provision that no injustice shall be done to them, and with that view I order that Campbell and the Farleys be added as asked; that when they are so added, Campbell shall deliver a pleading in which he shall state his case and demands against them, to which the Farleys may reply as they are advised.

This will, I think, enable the Court which tries the cause to do complete justice in the matter of costs.

It happens now, as it sometimes does upon very nice questions, that I have to act within a very short time.

I shall expect the defendant and Campbell to do every thing to facilitate the going down to trial in June.

The plaintiff appealed to a Judge in Chambers, the same counsel appearing.

PROUDFOOT, J., dismissed the appeal, with costs.

RE OLMSTEAD v. ERRINGTON.

Division Court—Prohibition—Costs of application for writ—Entitling of affidavits—O. J. A. secs. 23-25—Amendment—Rule 474.

Where a defendant, upon being sued in the First Division Court in the county of Middlesex, filed a notice disputing the jurisdiction and served a notice of motion returnable before a Judge in chambers, for an order directing the issue of a writ of prohibition to the said Division Court, to prohibit the Judge thereof and the plaintiff from proceeding with the suit in that Division Court on the ground of want of jurisdiction in that court to hear and determine the same, but did not entitle his notice of motion, nor the affidavit filed in support of the motion, in any Division of the High Court of Justice,

Held, affirming the order of O'CONNOR, J., in chambers, granting the writ, not a fatal objection, but one which could and should be amended under Rule 474, O. J. A.

Held, also, that, although before the motion for prohibition came on to be heard the plaintiff in the Division Court caused the plaint to be transferred to the proper Division Court in the county of Lambton, nevertheless the defendant, upon being sued in a wrong Division Court, had the right to apply for prohibition, and the Judge in chambers having in his discretion given the defendant the costs of the motion of prohibition, that discretion could not be interfered with.

[June 29, 1886.—*The Queen's Bench Division.*]

The plaintiff sued the defendant in the First Division Court of the County of Middlesex, to recover the amount of two drafts, dated respectively London, December 8th, 1884, and London, January 28th, 1885, for the sum of thirty-six dollars drawn by the plaintiff on the defendant, addressed to him at Petrolia and accepted by him, payable at the Bank of London, Petrolia, at three months, respectively. The summons was dated on 13th February, 1886, and was served on the defendant on 16th February, 1886. On the 25th day of February, 1886, the defendant filed with the clerk of the First Division Court of the County of Middlesex a notice disputing the jurisdiction of the court on the ground that the alleged cause of action did not arise in the division in which the action was brought: that the defendant did not at the time the action was brought, nor did he then reside or carry on business in the division in which the action was brought, and that the First Division Court aforesaid was not the court, the place of sitting whereof was the nearest to the residence of the

defendant. On 25th February, 1886, defendant made an affidavit in support of a motion for prohibition, styled as follows :

In the High Court of Justice
Division.

In the matter of a certain suit in the First Division Court in the County of Middlesex, wherein George Olmstead, surviving partner of the late firm of Olmstead Bros., is plaintiff,

AND

Chas. H. Errington is defendant.

This affidavit was filed on the 26th February, 1886, by F. Arnoldi, clerk in chambers, and on the said 26th day of February, 1886, the defendant caused the Judge of the County Court of Middlesex and the plaintiff each to be served with notice styled in like manner as the affidavit, that a motion would be made on behalf of the defendant before the Judge who might be presiding in chambers at Osgoode Hall, in the City of Toronto, on Tuesday, 2nd March, at the hour of eleven of the clock in the forenoon, or as soon thereafter as the motion could be heard, for an order that a writ of prohibition should issue prohibiting the Judge of the County Court of Middlesex, ex-officio Judge of the 1st Division Court in the County of Middlesex, and the plaintiff, or either of them, from proceeding in the matter of the said suit in the said First Division Court in the County of Middlesex.

This notice of motion, with affidavit of service thereof, was filed on 12th March, 1886, by F. Arnoldi, Clerk in Chambers, and on 13th March, 1886, there were filed by the said Clerk in Chambers, two affidavits, styled as the affidavit of the defendant was styled, one thereof made by the plaintiff on 27th February, 1886, stating that by mistake or inadvertence, as he was informed and believed, the said suit was entered in the First Division Court in the County of Middlesex, instead of the Eighth Division Court of the County of Lambton, and that he intended to cause an application to be made to

the Judge of the said First Division Court to transfer the said suit to the said Eighth Division Court in the County of Lambton; and the other made by his solicitor on 6th March, 1886, stating that at a sittings of the First Division Court in the County of Middlesex, held at the City of London, in the County of Middlesex, before John A. Mackenzie, Esq., one of the county Judges of the County of Lambton, the above-mentioned suit, being entered on the list of suits for hearing on that day, was called on for trial: that he thereupon asked the said Judge to transfer the said suit to the Eighth Division Court in the County of Lambton, alleging that by mistake or inadvertence the said suit had been entered in the First Division Court in the County of Middlesex, the jurisdiction of which the defendant disputed: that the said judge granted his application, and made an order transferring the said suit to the Petrolia Division Court, being the Eighth Division Court in the County of Lambton.

On the 10th March, 1886, O'Connor, J., before whom the motion for prohibition was made, gave the following judgment:

"After motion objecting to the jurisdiction, and notice of application for a writ of prohibition given, &c., the plaintiff applied for and obtained a change of the place of trial to the proper Division Court, thereby complying with what defendant required. Nothing is really in question now but the costs of this motion. I think the plaintiff in the Division Court must pay the costs. Whether by mistake or oversight, he put the defendant to unnecessary costs. However, the defendant's application was necessary for him. It is no answer to say he has not sworn to a good defence on the merits. He was not bound to do that on this application. If costs are not paid, and it be found necessary to issue the prohibition to enforce payment of costs, it will go."

On 11th March, 1886, the order was issued for a writ of prohibition prohibiting the said Judge and the plaintiff from further proceeding in the matter of the said

suit in the said First Division Court, and directing the said George Olmstead to pay to the said Charles H. Errington his costs of the application and of issuing the writ of prohibition, if it should become necessary to issue it, forthwith after taxation thereof, "no prohibition to issue if the costs were paid within one week of taxation thereof."

On the 18th day of March, 1886, *H. J. Scott*, Q. C., moved by way of appeal from this order.

Aylesworth, shewed cause.

ARMOUR, J.—Mr. Scott objected that the affidavit upon which the application was based was irregular and insufficient, because it was not entitled or styled in any particular Division of the High Court.

Section 23 of O. J. Act provides that "Every document by which any cause or matter shall be commenced in the said High Court shall be marked with the name of the Division to which the same is assigned."

Section 25 provides that, subject as aforesaid, every cause or matter afterwards commenced in the said High Court of Justice shall be assigned to one of the Divisions of the said High Court by marking the document by which the same is commenced with the name of such Division."

I think the objection cannot prevail, there is nothing in the statute requiring the document to be styled or entitled in any Division, but only to be marked with the name of the Division, and this need not be in the style or title, but may be by endorsement or otherwise.

There was no marking of the document, however, with the name of any Division, but this is amendable and should be amended: See marginal rule 474; *Robertson v. Coulter*, 9 P. R. 16.

The plaintiff sued the defendant in the wrong Division Court, and the defendant having duly filed a notice disputing the jurisdiction of that Court was entitled to apply as he did to this Court, to prohibit the plaintiff from further proceeding in that Court against him, on making it

appear to this Court by affidavit, as he did, that the plaintiff was so proceeding in the wrong Division Court against him.

The facts in the defendant's affidavit set forth, being uncontradicted, the defendant was entitled to the writ, but before the motion for it came on to be heard the plaintiff applied to and obtained from the Judge of the Division Court an order transferring the suit to the proper Division Court, and so the issue of the writ became unnecessary.

The learned Judge had the discretion to order the plaintiff to pay the costs of the application, and he so ordered, and it is a discretion that we cannot interfere with.

The order of my brother O'Connor, therefore, so far as it directs the plaintiff to pay the costs of application, will be affirmed; but the writ of prohibition will not issue, and this appeal will be dismissed, with costs.

WILSON, C. J., and O'CONNOR, J., concurred.

Appeal dismissed, with costs.

RE GEORGE TAYLOR AND THE ONTARIO AND QUEBEC
RAILWAY COMPANY.

Award—Interest—Consolidated Railway Act, 1879 (D).

Money was paid into a bank under Consolidated Railway Act, 1879 (D.), sec. 9, subsec. 28, and an order for immediate possession of lands expropriated by the company was made by a Judge under the subsection, and an award of compensation was made subsequently:

Held, that the landowner was entitled to interest on the amount awarded him only at the rate allowed by the bank on the money paid in and not at the legal rate.

[May 23, 1886.—*O'Connor, J.*]

THE Ontario and Quebec Railway Company, in order to obtain immediate possession of three parcels of land in the Township of York for their right of way, before the amount of compensation therefor was ascertained by arbitration, on 12th April, 1883, paid the sum of \$9,000 into the Canadian Bank of Commerce, to the joint credit of the company and the land owners (Messrs. Taylor Bros.), under an order made by the County Court Judge, under sub-sec. 28, sec. 9 of the Consolidated Railway Act, 1879 (D.); the solicitor for the Taylors appearing and consenting thereto.

This deposit of \$9,000 bore interest at the rate of 4 per cent. until 15th October, 1885, when the rate was reduced by the bank to 3 per cent.

In one of these cases, that of Geo. Taylor, an award was made and afterwards set aside by Cameron, J., (6 O. R., p. 338.) Another award was subsequently made, and O'Connor, J., ordered payment of the amount of it out of the deposit in the bank.

On settling the order a dispute arose as to the rate of interest to be allowed on the award; the company contending that they were only called upon to pay bank interest, while Taylor claimed interest at 6 per cent.

It appeared from the evidence on the motion for payment out, that the arbitrators in their award had allowed interest at 6 per cent. for two years from the time of taking possession of the lands by the Railway Company, and included it in their award.

J. Leys, for Taylor. The arbitrators having allowed 6 per cent., that rate must now govern. Taylor has been kept out of his money by prolonged litigation, through no fault of his own, and is entitled to legal interest as on a judgment. An award always bears legal interest.

The Railway Act contemplates payment of legal interest; see sub-sec. 33 of sec. 9, where the words "the interest" occur [*O'Connor, J.*—If the expression was "interest" only, I should agree with you]. I refer to *Macdonald v. Worthington*, 8 P. R. 154; *Sinclair v. G. E. R. W. Co.*, L. R. 5 C. P. 391.

Angus MacMurchy, for the Ontario and Quebec Railway Company. The cases cited do not apply to this case, where the Court has jurisdiction under the Railway Act. In cases such as the present one, the principle was laid down by Mowat, V. C., in *Great Western R. W. Co. v. Jones*, 13 Gr. 355. The \$9,000 here was appropriated by the Company with notice to the Taylors, for payment of the compensation to be subsequently ascertained; it has lain in the bank ever since, and the Company should not, while losing the difference between bank and legal interest on the balance remaining after the compensation is paid, be compelled to pay such difference on the other moiety to the land-owner. The case cited has been followed by Galt, J., in *Re Lea and Ontario and Quebec R. W. Co.*, 21 C. L. J. 154; where the same question came up as here. For an analogous decision under the Public Works Act, see *Wilkins v. Geddes*, 3 S. C. R. 216.

O'CONNOR, J.—I have no doubt as to the order I should make regarding the interest. While there is sufficient in the bank to cover the amount awarded, I do not see why the Railway Company should be compelled to pay a higher rate than the fund earns in the bank. If an award is made hereafter in another case for more than the amount in the bank, such a case can be dealt with then. In this case there is sufficient to satisfy the award, and the cases cited by counsel for the Railway Company support this view.

Order made allowing bank interest on the amount of the award.

NOTE.—See the next case.

RE PHILBRICK AND ONTARIO AND QUEBEC RAILWAY
COMPANY.

*Award—Interest—Consolidated Railway Act, 1879 (D.)—Arbitrators' fees—
Summary order.*

An order was obtained for immediate possession of land under the Consolidated Railway Act, 1879 (D.), and money was paid into the Canadian Bank of Commerce under the same Act by the company.

Held, that the land-owner was entitled to interest upon the amount subsequently awarded him from the date of the award, only at the rate allowed by the bank upon a deposit and not at the legal rate of six per cent.

Re Lea, 21 C. L. J. 154, followed.

In the litigation that ensued, it was determined that neither party was entitled to the costs of arbitration under the statute ; but the company, in order to take up the award, paid the whole of the arbitrators' fees.

Held, that a summary order could not be made to recoup the company for one-half the fees out of the moneys payable to the land-owner, and such order was refused without prejudice to an action for the same purpose.

[July 2, 1886.—*Boyd*, C.]

THIS was an application made on behalf of the land-owner, Philbrick, for payment of the amount of an award made under the provisions of the Consolidated Railway Act 42 Vic. ch. 9, (D.) under the following circumstances:—

The company and the land-owner being unable to agree upon the amount of compensation to be awarded the land-owner for their right of way through his property, the former deposited the sum of \$3,700 in the Canadian Bank of Commerce to the joint credit of the company and the land-owner, and thereupon obtained an order for immediate possession of the land required for their railway from the County Court Judge under sub-sec. 28, sec. 9, of the Railway Act.

Subsequently an arbitration was had between the parties, and the arbitrators awarded the land-owner the sum of \$3,516. Litigation was then commenced respecting the question of the costs of the arbitration, both parties contending that they were entitled to them. The Supreme Court finally decided, however, that neither party was entitled to costs.

The company took up the award, and in doing so were compelled to pay the arbitrators' fees. They offered to pay Philbrick the amount awarded, less half the arbitrators' fees, with interest upon the award at the rate paid by the Bank of Commerce, where the original amount of \$3,700 was deposited.

The land-owner's motion was for payment to him of the total amount of the award, with interest at six per cent., without any deduction for arbitrators' fees.

Alfred Hoskin, Q. C., for the motion.

George Tate Blackstock, contra.

BOYD, C.—As to the claim of the proprietor to be allowed six per cent. interest on the amount awarded to him from the date of the award, it is my duty to follow the case as decided by Galt, J., in *Re Lea*, 21 C. L. J. 154, which appears to me to be directly in point. I have not seen the text of that judgment, but I think that I would have reached the same conclusion independently of it. In this case an order was obtained for immediate possession of the land under sec. 9, sub-sec. 28, of the Railway Act, 1879, (D.), and thereupon the fund in question was deposited in the Canadian Bank of Commerce. When the award was made, as it was not complained of by either party, it was competent for the proprietor to have applied for and obtained the amount then awarded to him under sub-sec. 28. Failing to do this, he should not seek to charge more than the bank rate of interest against the railway company.

It has been determined in this matter that neither party is entitled to costs of arbitration under the statute, but the company having taken up the award, and to do so having paid the arbitrators' fees, now seek to have one-half the amount of this disbursement deducted out of the money payable to the proprietor out of the fund. It appears to me that I have no power to exercise a summary jurisdiction in this behalf. It is urged that natural justice requires that an order to recoup should be made,

based on *Marsack v. Webber*, 6 H. & N. 1. It is answered that these sums paid the arbitrators, though technically costs of award, are yet covered by the general term of the statute "costs of arbitration," and to this the case of *Re Walker*, 30 W. R. 703 (not cited) gives support. Difficult questions arise upon this question of contribution which are properly the subject of an action between the parties: *Bates v. Townley*, 2 Exch. 152. Besides this the language of the statute in sub-sec. 29 is adverse to my assuming any power of interference upon this application. It says no part of such deposit, &c., shall be paid to the owner or repaid to the company without a Judge's order, "which he shall have power to make in accordance with the terms of the award." This to my mind demonstrates (having regard to the circumstances and decisions in this case) that the railway company must be left to action, and I dispose of this application without prejudice to such litigation.

The result is, that I order the amount awarded to the proprietor with the accrued bank interest thereon to be paid out to him, and the balance of the fund with accrued interest to be paid out to the railway company. It is not a case for costs of this application.

NOTE.—See the preceding case.

BOSWELL V. GRANT ET AL.

[TWO CASES.]

Master in Ordinary, jurisdiction of—Consolidating actions—Judgment.

The Master in Ordinary has no jurisdiction to consolidate actions in which judgments have been entered, and in which references are pending in his office.

[June 12, 1886.—O'Connor, J.]

THESE were two actions for foreclosure upon two separate mortgages made between the same parties. The plaintiff and defendants were the same in each case. The actions were commenced at the same time, one in the Q. B. and the other in the C. P. D., and the usual *præcipe* judgment upon default of appearance was entered in each case with reference to the Master in Ordinary. The judgments contained orders for immediate payment by the defendants, J. N. Grant and E. A. Grant, of the amount found due by the Master's report, and also orders for possession. The subsequent incumbrancers were the same in each case. After the plaintiff and subsequent incumbrancers had proved their claims in the Master's office, the defendants, J. N. Grant and E. A. Grant, made an application to the Master in Ordinary to consolidate the actions; and the Master made an order that the second action be consolidated with the first one, and all further proceedings in the second action be stayed, and that the inquiries, &c., directed to be made and taken by the two judgments, be made and taken in the first action, and that the plaintiff be allowed the costs of one action only, except disbursements. He further ordered that the judgment, &c., in the second action be transferred by the Registrar of the C. P. D. to the Registrar of the Q. B. D., and that the plaintiff be at liberty to take all such proceedings and issue such writs under and in pursuance of the judgment in the first action, as if both causes of action had originally been contained in the one action.

The plaintiff appealed from the above order upon the grounds, that the Master had no power or jurisdiction to make it, the same not being in respect of matters arising in his office or authorized by the reference; and that under any circumstances he should have been allowed his costs to the date of the order. It also appeared that the Registrar C. P. D. held that he could not transfer the judgment, the same being entered on the judgment book.

The appeal was argued before O'Connor, J., June 7th h, 1886.

E. H. E. Eddis, for the appeal. The Master has exceeded his jurisdiction, and has no power to consolidate the actions after judgment. The two judgments could not be consolidated, and a judgment could not be transferred from one Division to another. Notwithstanding the order he could not issue process upon the Q. B. judgment to include what the plaintiff was entitled to under the C. P. judgment. The order made by the Master is beyond the scope of the reference to him, or of his jurisdiction under rule 541 (a) O. J. A. Under any circumstances he could not deal with costs prior to and inclusive of the judgment.

Haverson, contra. The Master had jurisdiction to make the order under rule 541 (a.) There is no doubt the order could have been properly made before judgment, and there is nothing in the practice to prevent two judgments being consolidated. There is no difficulty about transferring a judgment of one Division to another Division. The judgment is not what is entered on the books but the paper which is filed.

Rules 115, 325, 326, and 395 were referred to.

O'CONNOR, J.—I have no doubt that the two mortgages in question might and should have been dealt with in and by one action, and if a proper application had been made before judgment, they would have been consolidated. The order of reference (in each case) is, that all necessary in-

quiries be made and accounts taken, costs taxed, and proceedings had for redemption or foreclosure, and for these purposes that the cause be referred to the Master in Ordinary, &c. This is part of the judgment. The judgment is the foundation of and authority for the Master's proceedings. It is his authority. He has no power to do more or otherwise than as he is thereby directed. He has no authority, then, as I conceive, to alter, vary, contradict, or stay the judgment on which his authority is founded, in fact, the authority to him. Neither has he power to review or judge of proceedings in the action had prior to the judgment, and leading thereto, or to make any order respecting the same. He has no greater power or authority respecting matters referred to him than the Master in Chambers has; and the latter has no authority, except by consent of the parties, to stay proceedings after verdict—if not after verdict *a fortiori* he has no such power after judgment. The order must be set aside, but under the circumstances without costs.

This was originally an application for leave to appeal, as the time for appeal as of course had passed. But the parties agreed amongst themselves to argue the merits and obtain a decision without further notice.

REGINA EX REL. WILSON V. DUNCAN.

Controverted election—Municipal Act, 1883, (O.)—Master in Chambers, jurisdiction of—Acquiescence.

The Master in Chambers is not, in any sense, by delegation or otherwise, a Judge of the High Court of Justice to whom power is given by the Municipal Act, 1883, to try and determine cases of controverted municipal elections; nor can such power be given him by the acquiescence of the parties.

[June 11, 1886.—O'Connor, J.]

ON the 5th of January, 1885, the respondent was elected reeve of the township of York. His election was controverted by the relator, Arthur L. Wilson, who commenced the usual proceedings with a view to unseat the respondent, and also to disqualify him. Application was made to the Master in Chambers, whereupon the usual writ in the nature of a *quo warranto* was issued.

The writ appears to have gone astray, so that its precise date cannot be now given. In April following an order was issued by the Master to the Judge of the County Court of the county of York, to take the evidence in the case *vivâ voce*, which was done. The case was strongly contested, and the proceedings dragged along until the year expired. On the 29th January, 1886, the Master, after argument, decided and gave judgment against the relator, and in favour of the respondent. From that judgment the relator appealed, and the matter was argued before O'Connor, J., sitting at Chambers, in February, 1886. The argument was not then closed, and it was not found convenient to resume it until the third week of May, 1886, when the argument was concluded.

The other facts appear in the judgment.

J. K. Kerr, Q. C., for the appellant.

McMichael, Q. C., for the respondent.

O'CONNOR, J.—This is an appeal from the decision of the Master in Chambers, to me sitting as a Judge at Chambers.

The decision is objected to and appealed from on several grounds, but I find it unnecessary to refer to or dispose of any except the first, which is that the learned Master in Chambers is not a Judge of the High Court of Justice, and that, therefore, he has no jurisdiction or authority to try the validity of controverted municipal elections. Before proceeding to state my view and opinion on the question thus presented, I think it proper to say that although I feel bound to sustain the objection, the decisions of the learned Master have generally, as far as I know or have heard, given satisfaction; as much satisfaction probably as could be given by the decisions of any of the Judges: that resorting to him in Chambers was convenient, and tended to produce uniformity of procedure, practice, and decision.

I now proceed to state the method and course of my inquiry, and the grounds of my judgment.

Section 185 of the Consolidated Municipal Act, 1883 (O.), says the validity of the election or appointment of mayor, warden, or reeve, or deputy reeve, alderman, or councillor, may be tried by a Judge of the High Court of Justice, or the senior or officiating Judge of the County Court of the county in which the election or appointment took place.

Section 186, states the procedure, and what any such Judge may do.

Section 187, says "the Judge of the High Court before whom the writ of summons is returnable, may order the evidence * * to be taken *vivâ voce* before the Judge of the County Court," &c.

Section 195, empowers the Judge to frame issues and send them to be tried by a jury.

Section 196, provides: "In case the election complained of is adjudged invalid, the Judge shall forthwith, by writ, cause the person found not to have been duly elected, to be removed."

Section 205, says, "The decision of the Judge shall be final, and he shall, immediately after his judgment, return the writ and judgment, with all things had before him

touching the same, into the Division from which the writ issued, there to remain on record as a judgment of the High Court; and he shall, as occasion requires, enforce such judgment by a writ, in the nature of a writ of peremptory *mandamus*, and by writs of execution for the costs awarded."

Section 206, provides that, "The Judges of the High Court of Justice, or a majority of them, may by rules settle the forms of the writs of summons, *certiorari*, *mandamus*, and execution, &c., and may regulate the practice, &c., and the punishment for disobeying the same, or any other writ, or order of the court or Judge," &c.

The usual punishment for disobeying a writ or order of the court or Judge is imprisonment for the contempt.

I will now examine the position and authority of the Master in Chambers, and see whether the powers delegated to him by the Judges' order of 1870, pursuant to the Ontario Act, 33 Vic., ch. 11, sec. 5, (R. S. O. ch. 39, sec. 29) include the power to try controverted municipal elections.

The order of 1870, after reciting the Act, runs thus:—"It is ordered that the Clerk of the Crown and Pleas of the Court of Queen's Bench, be and is hereby empowered and required to do all such things, and transact business and exercise all such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the rules and practice of the said courts, or any of them respectively, were at the time of the passing of the said Act, and are now done, transacted, or exercised by any Judge of the said courts sitting at Chambers, except in respect of matters relating to the liberty of the subject, and to prohibitions and injunctions, and except (unless by consent of the parties) in respect of the following proceedings and matters, that is to say,—

All matters relating to criminal proceedings ;

The removal of causes from inferior courts, other than the removal of judgments for the purpose of having execution;

The referring of causes under the Common Law Procedure Act ;

Reviewing taxation of costs ;
Staying proceedings after verdict ;
Appeals in insolvency.

Section 31 of the Act last above cited gives an appeal to a Judge sitting at Chambers, from every order or decision made or given by such Clerk of the Crown and Pleas.

The matter stood thus until the Judicature Act came into operation, when a change was effected by Rule 420, made under authority of section 62 of the Act, as follows : "There shall be an officer of the Supreme Court to be named the Master in Chambers, who, in regard to all actions and matters in the High Court, shall have the power, authority, and jurisdiction heretofore in like cases possessed in the Superior Courts respectively, by the Clerk of the Crown and Pleas of the Court of Queen's Bench and by the Referee in Chambers of the Court of Chancery.

(a) "The said officer shall not have authority or jurisdiction in respect of the matters excepted in regard to the Clerk of the Crown and Pleas of the Queen's Bench by the rules of the Judges of the Courts of Queen's Bench and Common Pleas of Hilary Term, 1870," &c.

Rule 427 allows an appeal from any order or decision of the Master in Chambers, to a Judge of the High Court at Chambers.

The Master in Chambers is an officer of the court, and not a Judge, although authority is conferred on him, as appears by the foregoing citations, to perform certain functions of a Judge of the High Court at Chambers.

Upon the whole I conclude that the Master in Chambers is not, in any sense, by delegation or otherwise, a Judge of the High Court of Justice, to whom power is given by the Municipal Act to try and determine cases of controverted or disputed municipal elections, for the following reasons :

(1) The Municipal Act distinctly and by apt words vested in a Judge of the High Court or the Judge of the County Court a new and special jurisdiction to try such cases. The Judge who is applied to is bound to entertain the case if the materials presented are sufficient, and he then becomes seized of the case.

He is then the Judge in the particular case. The statute throughout speaks of him as the Judge. He cannot, then, delegate or authorize another to act in his stead, and certainly not an officer of the court. The jurisdiction and authority created and conferred by the statute, must be strictly construed and followed: *Christie v. Unwin*, 11 Ad. & Ell. at page 379; *Hartley v. Hooker*, 2 Cowp. at p. 524; *Hudson v. Tooth*, 3 Q. B. D. 46; *Wilberforce*, Stat. Law, pp. 54-98. Nor can the jurisdiction or authority be assigned, transferred, or delegated: *Hardcastle*, Stat. Law 148. Statutes giving jurisdiction are absolute; *ibid* 134.

(2) But the premises afford another test of invincible logic, adverse to the proposition that the learned Master has jurisdiction.

The statute makes the decision of the Judge final—there is no appeal from it. Then, the Judge intended by the Statute is a Judge from whose decision in the case there is no appeal. But an appeal to a Judge of the High Court at Chambers is expressly given from every order or decision of the “officer,”—that is the Master in Chambers.

It is therefore clear that the Master in Chambers is not the Judge intended by the Statute.

The policy of the legislature is that the proceedings and trial shall be summary, and as expeditious as the circumstances may permit, and that there shall be but one trial and one decision which is made final.

But if the case could be tried by the Master in Chambers, the appeal might result in a second trial, and at all events there would be a second decision, and delay, which is contrary to the policy of the statute.

It is, however, absurd to think of such a course of procedure, because the Judge's jurisdiction and authority are original and not appellate. The statute contemplates no such procedure, but precisely the reverse.

(3) The Judges' rule of 1870 excludes from the jurisdiction of the Clerk of the Crown and Pleas of the Queen's Bench (now the Master in Chambers) matters relating to

the liberty of the subject, and prohibitions and injunctions.

But the writ for the removal of the respondent from the office of mayor, warden, reeve, or councillor, who has been adjudged an usurper, contains a prohibition in this form : " We being willing that speedy justice be done in this behalf, as it is reasonable, command that the said (A. B.) do not in any manner concern himself in or about the said office but that he be absolutely forejudged, removed, and excluded from further using or exercising the same." The same writ contains what is in substance an injunction as follows :

" And we do further command that the said (naming the person adjudged entitled to the office) be forthwith admitted, received, and sworn into the said office, to use, exercise, and enjoy the same. And we hereby command you and every of you to obey, observe, and do all and every act, matter, and thing that may be necessary on the part of you or any of you in the premises."

Then as to the liberty of the subject; the proceedings may require to be enforced by attachment of the person for contempt, which involves imprisonment, and this is a matter relating to the liberty of the subject, in respect of which the Master in Chambers has no jurisdiction or authority.

It has not been argued, but it may be said, that the relator in this matter by his application to, and continuing his proceedings before the Master in Chambers, has acquiesced, admitted the jurisdiction, and waived his right to appeal on the ground of want of jurisdiction.

I am not of that opinion. I do not think that any acquiescence can confer jurisdiction contrary to the intent and meaning of the statute. Besides, the relator did only what every person in his situation was doing at the time.

The Master in Chambers had for several years exercised the jurisdiction under the eyes, and with the knowledge of the judges of the several courts, without question. The relator proceeded as everybody else did at the time and for years before, in all probability without thinking, under

the circumstances, anything about jurisdiction: and I do not think that debars him from taking the objection now.

Upon full consideration, I am constrained to declare the whole proceedings in the matter *coram non judice*—null and void *ab initio* and throughout. Of course there can be no costs to either party.

On my way to a conclusion in this case, I have not been unmindful of the provision of the Ontario Act of 1885, ch. 13, sec. 13, which does not seem to me to affect the question raised in this case.

[See *Reg. ex rel. Felitz v. Howland*, ante. p. 264.—REP.]

MACGREGOR V. McDONALD ET AL.

Discovery—Fraud—Will—Subsequent dealings with estate—Examination—Rule 235, O. J. A.—Production—Privilege—Solicitor.

In this action the plaintiff, in her statement of claim, charged her brother the defendant D. M. McD., with inducing her father to make a will in her mother's favor, with the fraudulent design on the part of D. M. McD. of obtaining the whole estate for himself, and charged that her father was induced to make the will by fraudulent misrepresentations, and that after her father's death, D. M. McD. obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife, and prayed to have the will set aside. D. M. McD., in his examination for discovery before the trial, admitted receiving the power of attorney from his mother after his father's death, and dealing with the estate under it, but denied having used any portion of the estate for his own purposes.

Held, that although what took place after the father's death was no proof of the fraudulent design, it might throw light upon it; and although the plaintiff was entitled to know generally what dealings the defendant D. M. McD. had with the estate, and to interrogate D. M. McD. upon his examination before the trial, as to whether he had invested all the moneys of the estate in his own or his wife's name, yet a general inquiry as to his dealings with each part and parcel of the estate, or as to what property came into his hands under the power of attorney, should not be permitted.

The O. J. Act has introduced a new intermediate practice, departing in some measure from the old rules of Chancery and Common Law, such new practice being indicated by Rule 235; that where a question has been substantially answered, a further answer ought not to be compelled, and when discovery would be oppressive, it is the duty of the Court to exercise its discretion by refusing discovery, as also where the discovery cannot possibly help the plaintiff to obtain a decree.

Parker v. Wells, 18 Ch. D. 477, considered and followed.

The defendant D. M. McD. claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant, F. McD.

No order to produce had at the time of the application been taken out as against F. McD., nor had she been served with notice of the application.

Held, that D. M. McD. should not have been ordered to produce these documents, without F. McD. being called upon to show cause why they should not be produced.

[June 26, 1886.—*The Common Pleas Division.*]

THIS action was brought by Mrs. MacGregor to set aside the will of her late father, the Hon. Donald McDonald.

The statement of claim charged that one of the plaintiff's brothers, the defendant D. Mitchell McDonald, by fraudulent misrepresentations, induced their father to make

a will in favor of his wife, their mother, the defendant Frances McDonald, with the fraudulent design on the part of D. M. McDonald, of obtaining the whole estate for himself, and that after the death of the testator D. M. McDonald obtained from Frances McDonald a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife. The defendant D. M. McDonald, in his statement of defence, denied these allegations.

On the 18th of February, 1886, the Master in Chambers made an order that the defence of the defendant D. Mitchell McDonald should be struck out, and that the plaintiff should be at liberty to sign final judgment, unless within ten days he should pay the costs, and attend at his own expense and submit to be examined, and answer all questions put to him in reference to his dealings with the estate of the Hon. Donald McDonald, the testator, in the pleadings mentioned, and generally upon the pleadings in this action, and should produce all books, papers, and documents in his possession relating to the matter in question. On the 26th of February the Master in Chambers made another order directing the defendant D. Mitchell McDonald to produce for inspection by the plaintiff the documents referred to in the first and second parts of the first schedule referred to in the defendant D. Mitchell McDonald's affidavit on production. The defendant D. Mitchell McDonald's affidavit set forth in the first schedule the documents which were in his possession, and which he was willing to produce, and in the second schedule documents which he alleged were in his possession only as solicitor for his co-defendant Frances McDonald.

Appeals were taken from these two orders to O'Connor, J., sitting in Chambers, on the 2nd of March. He dismissed both appeals with costs, and an appeal was taken to the Divisional Court of the Common Pleas Division.

W. Cassels, Q. C., and Holman, in support of the appeal. The defendant D. Mitchell McDonald has the papers which

he objects to produce, in his possession only as solicitor, and the papers are the property of his client; he has not the legal possession of them, or control over them, and he should not be ordered to produce them. No order to produce had been obtained against Frances McDonald when the order complained of was issued, and she was not notified of this motion: *Peile* on Discovery, p. 133; *Pulling* on Attorneys, p. 259; *Coates v. Birch*, 2 Q. B. 252; *Archbold's*. Practice, 13th ed., 1171; *Glyn v. Caulfield*, 3 Macn. & G. 463; *King of Sicilies v. Willcox*, 1 Sim. N. S. 301; *Taylor v. Rundell*, 11 Sim. 391. If the possession is a joint possession the Court will not order production: *Kettlewell v. Bars-tow*, L. R. 7 Ch. 686. Production was refused where the books belonged to a partnership of which defendant was a member: *Hadley v. McDougall*, L. R. 7 Ch. 312; or relating to a compromise of a suit with a third person not a party to the suit: *Warrick v. Queen's College*, L. R. 4 Eq. 254. Production will not be ordered of books in which a co-defendant is interested in the absence of the co-defendant: *Burbidge v. Robinson*, 2 Macn. & G. 244. Production of deeds will not be ordered in the absence of another party interested: *Murray v. Walter*, Cr. & Ph. 114; nor where defendant is a mere depositary: *Forman v. Nevill*, 14 L. J. Ch. 33; *Ford v. Dolphin*, 1 Drew. 222; *Penney v. Goode*, 1 Drew. 474; *Kearsley v. Philips*, 10 Q. B. D. 36, where the cases are reviewed. Where possession for the purpose of production is spoken of, it means the right and power to deal with the documents; actual corporeal possession is not meant, but legal possession in respect of which the party is authorized to deal with the property; *Peile* on Discovery 133; *Penney v. Goode* 1 Drew. 474; *Taylor v. Rundell*, Cr. & Ph. 104; *Palmer v. Wright*, 10 Beav. 284.

The position taken by the plaintiff in the pleadings is that D. Mitchell McDonald colluded with his mother, Frances McDonald, to induce the testator to make a will in favour of the latter, and that subsequently to the death of the testator, the defendant D. Mitchell McDonald obtained the estate

from the widow by undue influence, and that the fact of his obtaining the estate from the widow is evidence of the original collusion whereby the testator was induced to make the will. The dealing of the widow with the estate or the connection of D. M. McDonald therewith, can in no way strengthen the plaintiff's case against the will. The state of accounts between the two defendants has nothing to do with the issue as to the validity of the will. The defendant D. Mitchell McDonald denies obtaining any benefit from the estate and alleges that he acted solely and entirely as solicitor and attorney for his co-defendant Frances McDonald, but he objects to the disclosure of the state of the accounts and his dealings with the estate as being entirely irrelevant to the matters in question arising at the trial.

The question as to will or no will is fundamental, and should be determined first: *Peile* on Discovery, 27. Plaintiff must shew that the documents would be evidence to prove the case at the trial: *Kerr* on Discovery, p. 102; *Attorney-General v. Thompson*, 8 Hare 106. Objection to production can be taken either in answer or in the affidavits: *Parker v. Wells*, 18 Ch. D. 477. The affidavit distinctly states that the books contain entries relating to the business of the estate since the death of the testator, but do not relate to the plaintiff's case nor tend to strengthen it nor to weaken the defendant's case. The affidavit is positive that the documents do not relate to the issues in the action. The affidavit is conclusive: *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556; *Bewicke v. Graham*, 7 Q. B. D. 400; *Peile* on Discovery, 119; *Compagnie Financière v. Peruvian Guano Co.*, 48 L. T. 22. The Court must be satisfied that there is a real prospect of the documents being of material service to the plaintiff at the hearing: *Carver v. Pinto Leite*, L. R. 7 Ch. 90. The Court will protect a defendant against undue inquisition into his private affairs: *Moore v. Carven*, L. R. 7 Ch. 94, note: even where solicitor charged with fraud: *Great Western Colliery Co. v. Tucker*, L. R. 9 Ch. 376. The Court

will not order production where it would be unreasonable or oppressive; *Verminck v. Edwards*, 29 W. R. 189; *Parker v. Wells*, 18 Ch. D. 477; *Republic of Costa Rica v. Erlanger*, L. R. 19 Eq. 33. Even in actions claiming an account of partnership dealings or of business done as commission agents where the partnership or agency is denied the Court will not order production of books shewing business done. In such a case it might fairly be contended that the books themselves would shew whether the partnership or agency existed, but the Court has refused to order such production and inspection: *Turney v. Bayley*, 4 DeGex J. & S. 332; *Wood v. The Anglo-Italian Bank*, 34 L. T. 255; *Mansell v. Feeney*, 2 J. & H. 320; *Richards v. Gellatly*, L. R. 7 C. P. 127; *Rowcliffe v. Leigh*, 6 Ch. D. 256; *Greenough v. Gaskell*, 1 My. & K. 98. The plaintiff must first establish a *locus standi* before the Court will allow inspection of the accounts of the estate. In setting up an alleged next of kin, inspection of account was refused till heirship established: *Lane v. Gray*, L. R. 16 Eq. 552. Till the plaintiff has set aside the will she can have nothing to do with the estate: *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 66. A plaintiff claiming as heir-at-law cannot call for inspection of deeds in possession of devisee: *Peile*, p. 167. Where discovery is sought and objection raised the Court will direct an issue to be tried: Rule 235, O. J. Act; *Emma Mining Co. v. Grant*, 11 Ch. D. 918. See, at p. 926, the language of Jessel, M. R., shewing cases where the Court has directed issues to be tried.

MacGregor for plaintiff. The plaintiff charges that the defendant D. M. McDonald has taken a large benefit indirectly under the will, which he drew intending to get the bulk of the estate into his possession.

A will drawn by a person in his own favour is void *ab initio* under the civil law. Under our law the onus of supporting such a will is cast upon the defendant: see *Hogg v. Maguire*, 11 A. R., at p. 520; *Hegarty v. King*, 7 Ir. L. & Ch. 18, remarks of Lord O'Hagan, at p. 20; and *Scouler v. Plowright*, 10 Moo. P. C. 440.

The plaintiff charges the defendant with premeditatedly and fraudulently inducing his client (the testator) to execute a will in favour of one over whom he has and always had exercised an unbounded influence, intending through the subsequent use of such great influence to get the bulk of the testator's property into his possession to the exclusion of the other heirs; that after testator's death he obtained a general power of attorney from the sole devisee, and effected his design, and got the whole estate into his possession.

It is admitted that he did get the power of attorney; the rest is denied. We contend that the subsequent dealing with the estate will prove this, and that we are entitled to discovery of all facts that will aid the proof. It is admitted that these facts are well pleaded, and they are denied by defendant. In *Wigram* on Discovery, at page 46, the rule deduced from the authorities on this point, is given as follows: "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit."

The peculiar position of the defendant whose case is now in discussion as solicitor for the other defendant cannot avail as against discovery, for three reasons. 1st. From the nature of the charges of fraud set up by the plaintiff; see *Charleton v. Coombes*, 32 L. J. Ch. 284; *Phillips v. Holmer*, 15 W. R. 578; *Regina v. Cox*, 14 Q. B. D. 153; *Kelly v. Jackson*, 13 Ir. Eq. 129; *Pawson v. Merchants Bank*, 11 Pr. 18. 2nd. Because his connection with the transactions in question goes far beyond the character of solicitor for another. He is a principal actor. 3rd. The pleadings are in denial, and submit the whole matter for enquiry and proof. He has set up no privilege: *Kerr* on Discovery, pp. 39, 202, 203, and authorities there referred to. Where a defendant answers, he must answer fully, and his answer in denial throws the door open to the fullest discovery: *Lancaster v. Evors*, 1 Phil. 351.

The discovery sought may be ordered before the will has been set aside: *Chichester v. Lord Donegal*, L. R. 4 Ch. 419; *Unsworth v. Maddock*, 3 Madd. 432; *Hue v. Richards*, 2 Beav. 307; *Carter v. Goetze*, 2 Keene 581; *Carver v. Pinto Leite*, L. R. 7 Ch. 90. If the discovery will not injure the defendant, the ordering it will not be weighed too nicely: *Thompson v. Dunn*, L. R. 5 Ch. 573; *Saull v. Browne*, L. R. 9 Ch. 364. The allegations in the bill must be taken to be true for the purposes of discovery, and the question then is: Is the discovery material? *Gresley v. Mousley*, 2 K. & J. 288; *Minet v. Morgan*, 18 W. R. 1015. Everything that will throw light upon the transaction should *primâ facie* be produced: *Hutchinson v. Glover*, 1 Q. B. D. 138. It is not necessary that the answers should be evidence if we derive material benefit from them: *Sketchley v. Conolly*, 11 W. R. 573; *McGarel v. Moon*, L. R. 10 Eq. 22; *Girdlestone v. North British Mercantile Insurance Co.*, L. R. 11 Eq. 197; *Chadwick v. Bowman*, 16 Q. B. D. 561; *Leitch v. Abbott*, 31 Ch. D. 374.

The plaintiff does not claim an account of the estate as such, but of the defendant's subsequent dealing with the same as casting a light upon his previous intentions in inducing the making of the will, and in shewing that he had an interest in procuring it to be so made. She claims that upon a full examination of and production by the defendant D. M. McDonald, the allegations pleaded will be proved, and the onus of supporting the will will be cast upon the defendants.

The case of *Lane v. Gray*, L. R. 16 Eq. 552, cited for the defendant, does not apply, as plaintiff's kinship is admitted. It is not shewn that the discovery sought is either oppressive or prejudicial. If there is nothing to conceal, the giving of the discovery will be a complete and effectual answer to plaintiff's charges of fraud.

The examination on the motion for a receiver taken after the argument before the Master cannot be used on this appeal. Its length was caused by defendant's refusal to answer properly questions which had been put.

On the question of production, the objection that Frances McDonald was not notified to appear before the Master in Chambers, was not taken below. Counsel for defendant D. M. McDonald was one of her solicitors on the record. His affidavit on production was drawn and filed by her solicitors and endorsed with their name. This objection could not avail as to defendant's private ledger, dockets, and letter books, which contain the most important entries. We are entitled to production and inspection of these. See *Swanston v. Lishman*, 45 L. T. 360.

ROSE, J.—The first appeal is from an order of O'Connor, J., dismissing an appeal from an order of the learned Master in Chambers, striking out the defence of the defendant D. M. McDonald for refusing to answer certain questions put to him on an examination before Mr. Heward, a special examiner.

We shall be assisted to a conclusion if we correctly apprehend the issues to be tried, and as to which the examination was apparently directed.

The plaintiff charges her brother, the above named D. M. McDonald, with inducing her father to make a will in her mother's favour with the fraudulent design on her brother's part of obtaining the whole estate for himself, and charges that her father was induced to make the will by fraudulent misrepresentations.

I do not stay to set out what is charged as the fraud and fraudulent contrivance or means taken to accomplish the purpose, but it is further charged that the scheme was successful, and that after her father's death he obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and the name of his wife.

What therefore she undertakes to prove is the fraudulent scheme That of course must have been perfected and carried into execution before the testator's death. What took place afterwards may throw light upon such evidence as may be given in proof of the scheme.

It appears therefore to me that the plaintiff was entitled to know generally what dealings the defendant D. M. McDonald had with the estate.

It appears from the examination that he admitted obtaining or receiving a power of attorney from his mother after his father's death, and dealing with the estate under it.

He says his dealings were with the estate as his mother's solicitor, and that he acted under her instructions. That does not seem to me to affect the case one way or the other.

If he formed the scheme of getting control of the estate, he could accomplish his purpose when he received the power of attorney, and if, as charged, his mother was privy to the scheme, she, by giving him the power of attorney, put it in his power to carry out his design.

That he had the power of attorney, and acted under it, would be perfectly consistent with honesty and fair dealing, and in itself would amount to nothing. It becomes of importance only with other prior evidence shewing the fraudulent scheme.

The plaintiff was not, however, content with the above information, but sought to enquire particularly as to the mode of dealing with the estate, asking as to the sale of specific portions. I do not see how such an enquiry could assist in determining the issue raised. It could, it seems to me, only bear upon the enquiry as to whether the brother had invested the moneys in his own or his wife's name.

If that was the intention, it is noticeable that no question was put as to such dealings with the moneys.

A perusal of the examination which took place on the 5th of February, does not disclose very clearly what the plaintiff complains of, unless she desired to be allowed to go into a general enquiry as to the dealings with each part and parcel of the estate.

If this was her intention, I have no doubt, under the decision in *Parker v. Wells*, 18 Ch. D. 477, such enquiry should not be permitted.

I am convinced that such was the intention of the plaintiff, and that the objection to such enquiry is what was complained of.

I am led to this conclusion from a perusal of the examination of the 5th of February, and of the prior examination on the motion for injunction begun on the 18th of January, and referred to in the plaintiff's notice of motion of the 17th of February.

On the examination of the 5th of February the defendant was represented by Mr. Cassels, and the following incidents will probably indicate the dispute.

When the examination opened Mr. MacGregor asked "for the production of the books, papers, documents, &c." Mr. Cassels, "We do not produce any books of the estate."

Nothing further was said at that moment as to their production, but a little later Mr. MacGregor said: "I want these books, mortgages, and documents produced." Mr. Cassels: "What has Mr. McDonald got to do with the books of the estate?"

Mr. MacGregor—"He has them in his own right."

Witness—"Whatever I have, I have as solicitor for my mother."

No ruling is asked for, and the examination proceeds, the defendant declining to give information as to the books, &c., which he claimed to have as his mother's solicitor.

Again, after enquiring as to lands belonging to the estate, in answer to which information was given so far as it was sought with reference to what estate the testator died seized of, the plaintiff's counsel enquired as to the sale of the Iron Island in Lake Nipissing. The defendant declined to give any information on the ground, as I understand it, that the plaintiff was not entitled to enquire into the dealings with the estate until she had shewn an interest in it, which she could not do while the will stood.

The only question as to which a ruling seems to have been sought was the following:

"Q. Then you decline to give us a statement of what personal property came to your hands under that power of attorney? A. I decline answering that question.

Mr. Cassels—We object that the plaintiff has no right whatever to the property or anything else here until she has satisfied the Court that the will is to be set aside; if the will is not set aside, this is utterly irrelevant.

The Examiner—I will not undertake to make a ruling, and you can go before Mr. Dalton.”

As I have said, I do not think it will assist in determining the issue in this matter to know what personal property came into the hands of the defendant under the power of attorney. It suffices to know that he had control of the whole estate under the power of attorney. As I have indicated, it might be of some moment to know whether the defendant purchased in his own name any properties with the moneys which he controlled; but no question was asked as to that, and therefore no refusal was made to answer such a question.

The following question indicates the scope of the enquiry:

“Q. Can you give us the details of these moneys that you received and invested for her? A. I decline to do so.”

Mr. Cassels said: “Any information of his own he will give, but what is acquired from his mother as solicitor he objects to give.”

It was certainly “information of his own” if he had invested the moneys in purchase of properties in his own or his wife’s name; but in response to Mr. Cassels’ offer no question was asked except of the nature following:

“Q. Was there any portion of the personal property of the decedent that you did not get in your possession under this power of attorney?” To which was answered, “Excepting as solicitor I have never got any portion.”

It may be it was the intention of the plaintiff’s counsel to trace each piece of real estate and each sum of money or other parcel of personal estate through the books, and make the defendant give from “books, mortgages, and documents,” a detailed account of his dealings with the estate so as to discover whether any portion was invested

in his own or his wife's name. If such was his intention, I think it should not be permitted until the will has been successfully attacked. It would be burdensome, inquisitorial, and if the claim is ill-founded, terribly unjust.

When we read the examination taken in January on the motion for injunction, we find that the defendant had been subjected to examination on the whole groundwork of the suit, and we can see why the specific questions were not in February put as to his purchase of real estate in his own name; for there, in the most explicit terms, he denies having in any way, except by increase of professional business, derived any benefit from the estate. I make the following extract:

“Q. Have you appropriated to your own use any portion of the moneys of this estate? A. Not one dollar.

Q. Have you borrowed any money from the estate or from your mother? A. Not one dollar.

Q. Have you purchased any properties in your own name with the moneys derived from the estate? A. Not directly or indirectly.

Q. My question is, did you purchase any property? A. No, never purchased any property.

Q. With the proceeds? A. With the proceeds.

Q. No property, either real or personal? A. No property, either real or personal.

Q. In your own name? Nor in any body else's name except what I may have purchased on behalf of my client in her own name.

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Q. Have you benefited in any way from your handling this estate other than the accession of business that came to you acting as her solicitor? A. None whatever.

Q. You have received no benefit whatever? A. None whatever.”

These answers are either true or false.

If true, the plaintiff has no right to further enquiry. If false in what way can the enquiry be further prosecuted so as to discover the falsity? Must it not be by requiring

the defendant to account for every dollar of his private estate so as to see whether or not he has purchased the property with outside moneys?

To examine him with reference to his father's estate would advantage little, for if he be wicked enough to swear falsely, he could easily balance the estate account by false entry, or, if so disposed, might admit large moneys in hand for investment as his mother's solicitor.

But even if an investigation of each item would lead to discovery of perjury, I do not think at this stage it should be permitted. The enquiry would be too burdensome and the advantage too speculative.

Therefore, I am of the opinion that the plaintiff has obtained all the information she is entitled to at this stage; that further enquiry would be too burdensome and oppressive, and, if the plaintiff fails to establish the fraud, useless.

I do not attempt to lay down the principles governing discovery other than to refer to *Parker v. Wells*, supra. It would necessitate an almost full copy of the judgments in that case to give their full effect.

It may however be said to establish that the Judicature Act has introduced a new intermediate practice, departing in some measure from the old rules of Chancery and Common Law, such new practice being indicated by English Order 31, Rule 19, and Rule 235, O. J. A.; that where a question has been substantially answered, a further answer ought not to be compelled; and that where the discovery would be oppressive it is the duty of the Court to exercise its discretion by refusing discovery, as also where the discovery cannot possibly help the plaintiff to obtain a decree.

Although not strictly before us as part of the material upon which the orders below were based, we have had on the argument brought before us the result of an enquiry permitted in March last on a motion for a receiver. It is said to have taken portions of eleven days and covers 134 pages of printed matter. I have looked at it to see what has been the result of enquiries, apparently the most minute in their character, and at this stage of the pro-

ceedings apparently inquisitorial and oppressive. The plaintiff's counsel declares that, after spending all that time and labour in investigating the dealings with the estate, it will be impossible for him to ascertain where the moneys passing through defendant's hands are "without an investigation of these private transactions unconnected with the estate,"—a result which it seems to me might have been seen from the beginning, and well demonstrates the impropriety of allowing such investigations.

I am not sufficiently seized of the facts connected with the management of the suit to understand how such an examination was permitted, but am much impressed with its cruelty unless the defendant is guilty of the fraud charged.

I cannot admit the right of a litigant by charging fraud in pleadings, to spend days in prying into the private affairs of his opponent, it may be to his financial ruin.

I think I cannot better express the effect of a perusal of the inquisition in this case than in the words of the late Master of the Rolls in *Parker v. Wells*, 18 Ch. D., at p. 485: "I never saw anything more oppressive or unreasonable. It is only in family suits where a bitter feeling has arisen, that such unreasonable demands are made. A discovery, such as is asked for by this interrogatory is only tolerable where the exigency of the case requires it, and here such a discovery is not necessary."

A comparison of that interrogatory with those appearing in the evidence in this case is not in the plaintiff's favour.

If the learned Master and Judge whose decisions are in review before us, had the illustration which has been produced to us of the futility of the line of examination sought to be enforced by the plaintiff, I am sure the matter would have appeared to them differently.

As it is, in my opinion the orders appealed from should not have been made, and the present appeal must be allowed with costs, and the orders below rescinded with costs.

The second appeal is from an order of O'Connor, J., affirming an order of the learned Master in Chambers, directing production and inspection by the defendant D. M. McDonald, of certain books and papers which, by his affidavit on production, he claimed to be privileged from production because (1) they did not in his opinion relate to the matters in question, and did not contain anything tending to impeach his defence, or to support the plaintiff's claim. (2) That he held them as solicitor for his co-defendant Frances McDonald.

Neither the learned Master nor the learned Judge delivered written judgments, and we are not informed as to the opinions upon which their decisions were based.

No case has been cited, nor have I found any in which the question has arisen in a suit where the solicitor and client were made co-defendants, and charged as joining in the same fraud.

A solicitor might be made party to a suit for the purpose of discovery, coming under the general head of agent. See observations by the late Master of the Rolls in *Weise v. Wardle*, L. R. 19 Eq. 171.

It is clear that a person occupying a fiduciary position, although legally in possession of documents relating to the trust, will not be allowed to produce them in the absence and to the prejudice of his *cestui que trust*: *Peile's Law of Discovery*, p. 134.

No order to produce had at the time of the application been taken out as against Frances McDonald, nor had she been served with notice of the application.

It may be for all that appears before us that she could successfully resist an attempt to compel her to produce the documents. It would certainly appear inconvenient and improper to attempt to determine that question in her absence.

It is said that the charge of fraud takes away all privilege. I do not stay to enquire with what modifications that doctrine should be stated, but certainly it seems not the most proper course, because a solicitor is joined with his

client in a charge of fraud, to allow the plaintiff to compel production by the solicitor of his client's papers without allowing the client to be heard on the application. If the client has a right to protect the documents from inspection, it of course must be that inspection should not be ordered as against the agent.

The documents ordered to be produced for inspection are: 1. Certain deeds, documents, and papers which have accumulated during many years, belonging to the estate of the late Hon. D. McDonald.

It does not clearly appear whether these were all of a date prior to the testator's death, and related solely to ordinary business transactions. If so, I am of the opinion, for reasons given in my judgment on the appeal from the order striking out D. M. McDonald's defence, that they do not relate to the matters in dispute so as to entitle the plaintiff at this stage to inspection. And I am of the same opinion, if they are of a date subsequent to the testator's death and relate solely to similar transactions.

If the application turned on that question possibly a further affidavit would be requisite, giving fuller information before a just decision could be reached.

2. Ledger of the late Hon. D. McDonald. It is difficult to see how an inspection of this book could at this stage assist the plaintiff.

3. Journal of Frances McDonald.

I understand this to relate to transactions respecting the estate.

As to this she surely should be heard before inspection could properly be ordered.

I am assuming in the above observations that an investigation of the material on the motion before the learned Master would answer the statements made by the defendant in his affidavit, that the papers, &c., do not relate to the matters in question, and that such conclusion could be arrived at without impinging the rule in *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556.

In the absence of authority I do not think it well to

sanction the practice followed in this case. I think the plaintiff should have taken out his order to produce as against Frances McDonald, and on her affidavit being filed, if she had not objected to producing such books, documents, &c., no necessity for this motion would have arisen. If she had objected, then on motion, notice of which might be given to both her and D. M. McDonald, the Court would be able, without feeling the embarrassment which here arises, to make such order as might seem just.

As a matter of fact when the order for production was served on Frances McDonald, she did resist production, and her appeal from an order directing a better affidavit setting out the documents in question with others, has been heard and is now standing for judgment by this Court.

One of the two sets of orders and appeals might well have been avoided had the course I have suggested been taken.

We were referred to the judgment of Wilson, C. J., on such appeal to him from the order of the learned Master directing a better affidavit, as shewing that fraud destroyed all privilege.

I have looked at the cases referred to and they are as to the question of production of documents claimed to be privileged from production, on the ground of their being privileged communications between solicitor and client, and therefore do not assist us here.

I found one case in which documents in the hands of a solicitor were ordered to be produced: *Walburn v. Ingilby*, 1 My. & K. 61, but the question there was as to whether documents in which third parties were interested would be ordered to be produced by others jointly interested. The solicitor was merely custodian for all the parties and was not a party to the suit. The decision therefore plainly did not touch the question as to a solicitor being ordered to produce documents belonging to his client, without the client being called upon to answer the motion.

In my opinion the order should not have been made,

and the appeal should be allowed, with costs, and the orders appealed from rescinded, with costs.

CAMERON, C. J., and GALT, J., concurred.

Appeals allowed.

An application for leave to appeal was afterwards made to the Court of Appeal, and dismissed.

IRELAND V. PITCHER ET AL.

Action against magistrates—Costs, scale of—R. S. O. ch. 73, secs. 12, 18, 19—Appeal from taxation—Time—Rule 427, O. J. A.

In an action against Justices of the Peace for false imprisonment, &c., the Divisional Court (10 O. R. 631) ordered judgment to be entered for the plaintiff for \$25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of Court might direct. Upon appeal from taxation;

Held, that the action being within the proper competence of the Division Court, (unless the defendant objected thereto) the plaintiff should have costs only on the scale applicable to that Court, and the defendants should have their proper costs by way of deduction or set-off.

Held, also, [CAMERON, C.J., *dubitante*] that the effect of R.S.O. ch. 73, sec. 19, read in connection with sec. 12 of that Act and with R. S. O. ch. 43, sec. 18, sub-sec. 5, R. S. O. ch. 47, sec. 53, sub-sec. 7, and R. S. O. ch. 50, sec. 347, is not to provide that the plaintiff should have costs on the Superior Court scale when his recovery is within the jurisdiction of an inferior Court.

Per CAMERON, C. J. The case came under sec. 18 rather than sec. 19 of R. S. O. ch. 73.

Appeals from taxation should be brought on within a reasonable time, and within eight days, the time limited for appeals under Rule 427, O. J. A., is a reasonable time.

Stark v. Fisher, 11 P. R. 235, and *Quay v. Quay*, 11 P. R. 258, approved.

[June 26, 1886.—*The Common Pleas Division.*]

THIS was an appeal (enlarged before the Divisional Court by a Judge in Chambers) from the decision of the Local Master at Brantford as to the scale upon which the costs should be taxed to the plaintiff under the judgment of this

Court, reported 10 O. R. 631, the Master ruling that the costs should be taxed upon the scale applicable to actions properly brought in the High Court.

The action was against Justices of the Peace for false imprisonment, &c. The statement of claim alleged that the acts complained of were done maliciously and without reasonable and probable cause, and the jury so found, and assessed the plaintiff's damages at \$25. The case came before the Divisional Court which ordered judgment to be entered for the plaintiff for \$25. No order was made as to costs, the Court leaving them to "be taxed according to such scale and with such rights as to set-off as the statute and rules of Court may direct."

Aylesworth, for the appeal.

H. T. Beck, contra.

ROSE, J.—The defendants claim that the plaintiff is entitled to costs only upon the scale applicable to suits of the proper competence of the Division Court, the recovery being only for \$25 damages.

The plaintiff raised the preliminary objection that the appeal was too late, not having been made within eight days, as provided by Rule 427, O.J.A.

At the time that rule was passed the Act under which this appeal has been made was not in force. See 48 Vic. ch. 13, sec. 22 (O.) (1885.)

The learned Chancellor held in *Stark v. Fisher*, 11 P. R. 235, that by analogy to the practice under that rule the appeal should have been made within eight days, and in *Quay v. Quay*, same vol. p. 258, gives his reasons for such ruling.

It appears that according to the old Chancery rule proceedings should be taken "forthwith," and it was admitted that the rule at common law was "within a reasonable time."

As there is no rule specially applicable, it will be convenient to follow the rule laid down for the guidance of

the practitioners in the Chancery Division, and hold that within eight days will be within a reasonable time.

As power is given under Rule 462 to enlarge the time for bringing on the appeal we had power on the hearing to enlarge the time and to hear the motion.

As the Court informed the plaintiff that the enlargement must be granted if necessary, the argument proceeded. We have, however, thought it best to state the rule formally for the guidance of the profession.

The plaintiff's counsel relied upon sec. 19, ch. 73, R. S. O., as entitling his client to full costs.'

In *Arscott v. Lilley*, 11 O. R. 285, we held that this section had been repealed by the O.J.A. That decision is I believe, now in review before the Court of Appeal, but until reversed it binds us.

As sec. 19 must be taken to have been repealed, the scale must be determined by Rule 428*a*, O. J. A., which provides, "In case of trial by jury, and the Judge or Court makes no order respecting the costs under Rule 428, the taxation of costs shall be under such scale of allowance only as would have been applicable before the passing of the Judicature Act; and the event shall, in such case, be to recover costs according to such scale, subject to such rights of set-off as to costs as apply under the C. L. P. Act."

This rule throws us back prior to the Judicature Act and it now becomes necessary to consider the provisions of sec. 19.

Section 18, sub-sec. 5, of the County Court Act, and sec. 53, sub-sec. 7, of the Division Court Act provide for bringing actions against a Justice of the Peace in such Courts unless the Justice objects thereto.

Section 12 of ch. 73, provides that actions are not to be brought in such Courts if objected to within six days after being served with notice of action.

By section 19 it is provided that "If in any such case it is stated in the declaration, or in the summons and particulars if the plaintiff sues in the Division Court, that the act

complained of was done maliciously and without reasonable and probable cause, the plaintiff, if he recovers a verdict for any damages, or if the defendant allows judgment to pass against him by default, shall be entitled to his full costs of suit to be taxed as between attorney and client; * * .”

This section is taken from the Imperial Act 11 and 12 Vic. ch. 44, sec. 14, where the reference is to the County Court, in which there is a tariff of costs between attorney and client. In introducing the provisions into our legislation the Division Court was substituted for the County Court in seeming forgetfulness that attorneys were not recognized as such in the Division Court; see *Sinclair's* Division Court Act, 1880, notes to section 75; and that the words “as between attorney and client” were not appropriately used with reference to the costs allowed in such Court. They were, however, appropriate to the costs recoverable in the County Court in England, and hence in construing the statute we may determine the meaning of the section by construing it as if costs as between attorney and client were recoverable in the Division Court. The words are, however, of importance as shewing that in framing the clause it was recognized that actions might be brought in the Division Court.

Then does the provision allowing the plaintiff full costs as between attorney and client entitle the plaintiff to full costs without regard to the amount of damages recovered? If so, we have the anomaly that while special provision is made for bringing actions in the Division and County Courts, and while ch. 73 is “An Act to protect Justices of the Peace and other officers from vexatious actions,” an ill-disposed and financially irresponsible plaintiff, well knowing that his right to recover can only be rested upon technical grounds, and that he ought not to, and probably will not, recover more than nominal damages, can bring his action in the Superior Court, and vex the defendant with large costs. Such a construction would turn the Act into “An Act to expose Justices of the Peace and other officers to vexatious actions.”

I have looked for some authority determining the question, but have found none, nor were we referred to any. The words "full costs" were by the Court in *Irwine v. Reddish*, 5 B. & Ald. 796, and *Jamieson v. Trevelyan*, 10 Ex. 748, determined to mean no more than ordinary costs between party and party, "no distinction being known in the law between costs and full costs." And in these cases it was decided that a Judge could certify under 43 Eliz. ch. 6, to deprive a plaintiff of costs, notwithstanding that under the statute he is declared entitled to full costs. The Court held that effect could thus be given to both statutes. See also *Williams v. Miller*, 1 Taunt., at p. 400, where Chambre, J., said: "The plaintiff will still have his costs, though they will be small."

It will be observed that the Court in *Jamieson v. Trevelyan* declined to recognize *Doe d. Hyde v. The Mayor, &c., of Manchester*, 12 C. B. 474, as an authority on the point, because there the rule was made absolute without opposition.

The words "as between attorney and client" were probably added in consequence of these or similar decisions as to the meaning of the words "full costs," and in my opinion the effect of sec. 19 read with the sections I have above referred to, and sec. 347 of the C. L. P. Act, to which I will refer, was merely to provide that if the plaintiff recovered under the conditions set out he would be entitled to his costs as between attorney and client, but that it was not intended to provide that he might vex a defendant by bringing in the Superior Court an action of the proper competence of the Division Court.

Section 347 of the C. L. P. Act is as follows: "* * * in case a suit of the proper competence of a Division Court is brought in either of such Superior Courts or in the County Court, the costs shall be taxed in the manner hereinafter mentioned." Then follow the well-known provisions as to certifying. It will be observed that the expression "full costs" has been adopted in framing

one of the certificates to express Superior Court costs. The form of the certificates using this expression is not found in the C. L. P. Act of 1853, and was apparently introduced by the 31 Vic. (O.) ch. 24, sec. 3.

By sub-sec. 2 of sec. 347, unless the Judge who presides at the trial certifies in open court that the cause is a fit one to be withdrawn from the Division Court and brought in the Superior Court, "the plaintiff shall recover his costs of suit according to the practice of the Court in which *the action should have been brought* in like manner and subject to the like deduction or set-off for costs of issues upon which the defendant has succeeded, as he would have done, and would have been subject to in case he had brought his action in such inferior Court."

Now it seems to me to be plain that this action was of the proper competence of the Division Court and might have well been brought therein, and, unless the provisions of sec. 19 are intended to prevent the application of the provisions of sec. 347, I think the plaintiff is entitled to costs according to the practice of the Division Court and subject to deduction or set-off.

For the reasons above given I think sec. 347 does apply.

The provision as to the costs being taxed to the plaintiff as between attorney and client is of no force, as "according to the practice" of that Court no such costs are taxable.

An observation made by Draper, J., in *Keeley et ux. v. Raile*, 2 C. L. Chamb. R. 157, may be somewhat in point.

There were two actions against the defendant. The provisions of the statutes 4 and 5 Vic. ch. 26, and 14 and 15 Vic. ch. 54, were under consideration, and especially sec. 3 of the latter Act, providing that where tender of amends was not made, the plaintiff shall have his costs of suit. The learned Judge said: "Then no tender of amends being made or pleaded, and the issue on not guilty being found for plaintiff in each case, *costs will follow according to the ordinary rules of law*"

The cases may again be found in 9 U. C. R. 666, but the

decision there reported does not affect the point under discussion.

In the same vol., *Hawkes v. Richardson*, p. 229, may be found an interesting discussion as to the effect of the provision as to costs in an action of trespass or trespass on the case where the plaintiff does not recover more than forty shillings.

The history of the legislation on the subject of costs in actions against Justices of the Peace may be found in 4 and 5 Vic. ch. 26, sec 40; 14 and 15 Vic. ch. 54; 16 Vic. ch 180; C. S. U. C. ch. 126; R. S. O. ch. 173. I also derived assistance from *Marshall's Law of Costs*, pp. 23 and 235.

In my opinion the appeal must be allowed, and the matter referred back to the Master to tax to the plaintiff costs according to the practice in the Division Court, and to the defendants their proper costs by way of deduction or set-off.

The defendants are also entitled to their costs of this appeal.

CAMERON, C. J.—The recovery of the plaintiff in this case was by reason of the defendants having acted outside of their jurisdiction as Justices of the Peace. Therefore before the abolishment of the technical distinction between case and trespass they would have been liable in an action for trespass and false imprisonment. In such an action by section 18 of ch. 73, R. S. O., where the plaintiff recovers, he is entitled to costs in the same manner as if the said Act had not been passed. But by section 19, if it be stated in the declaration, now statement of claim, or in the summons and particulars in the Division Court, “that the act complained of was done maliciously and without reasonable and probable cause, the plaintiff, if he recovers a verdict for any damages, * * shall be entitled to his full costs of suit to be taxed as between attorney and client.” I am not prepared to say that these two sections read together do not, where in the statement of claim the act complained of is stated to have been done maliciously, put the right to costs

on a different footing from what it is in ordinary actions in the absence of an exercise of discretion as to the costs by the Judge before whom the cause is tried, or by the Divisional Court. If there is no difference, clauses 18 and 19 would seem to be wholly unnecessary. I am inclined to read them as giving to a successful plaintiff a right to costs as between attorney and client according to the tariff of the Court in which the action is instituted. But it is not necessary so to decide in the present case, and I concur in the opinion that the appeal must be allowed. The language, "if in any case it is stated in the declaration that the act complained of was done maliciously and without reasonable and probable cause, the plaintiff, if he recovers a verdict for any damages, is entitled to his full costs of suit between attorney and client," in the 19th section, must be read as if it were written "truly stated," and the mere statement of the act being malicious without a recovery as for a malicious act, will not entitle the plaintiff to costs different from what he would be entitled to if the words "maliciously and without reasonable and probable cause" had been omitted.

The authorities referred to by my learned brother Rose are certainly strong to shew that the term "full costs" has no more force than "costs," but I am not able to accept them as determining the rights of parties under this particular statute. The questions decided were different from those presented on this appeal. The cases of *Williams v. Miller*, 1 Taunt. 400, and *Irwine v. Reddish*, 5 B. & Ald. 796, merely decided that where a subsequent statute gave full costs it did not operate to repeal 43 Eliz. ch. 6, and a Judge had power under the latter Act to deprive the plaintiff of costs, and the expression of the Court that there is no distinction known in the law between costs and full costs, does not lay down as a rule that under no circumstances the use of the term "*full costs*" can confer a right to costs different from the right where the word "full" is omitted. In *Jamieson v. Trevelyan and wife*, 10 Ex. 748 the point decided was that *full costs* meant costs between party and party, and not costs between attorney and client,

and did not include the costs of making a distress which were not costs in the cause. The Legislature ought not to be credited with using words uselessly, and where a sensible meaning can be given to a noun qualified by an adjective, different and more extensive than the noun would have not so qualified, weight should be given to such adjective. I think the Legislature intended the words "*full costs*" to have more force than the word "costs" alone would have. Though in some cases "costs" would give the same right as "full costs," it does not follow that "full costs" can, under no circumstances, have greater force and mean more than "costs." Under sec. 18, for instance, where the word costs is used without qualification, there is no doubt costs according the amount of the verdict would be awarded, and if the verdict shewed a claim within the jurisdiction of the County Court or Division Court, the costs to which the plaintiff would be entitled would be the costs appropriate to those Courts, and would not be the full costs of the Superior Court, in which the action is brought, for the full costs of such Court would be the costs appropriate to services rendered in that Court and not in some inferior Court. In *Doe d. Hyde v. Mayor, &c., of Manchester*, 12 C. B. 474, it was decided that "*full costs and expenses*" entitled the lessor of the plaintiff to costs between attorney and client and not merely a liberal allowance of costs between party and party. To me the imposition of full costs was intended to be punitive in cases where magistrates had acted in their office maliciously to the injury of the plaintiff. While not therefore absolutely dissenting from the opinion entertained by my learned brothers, I do not wish to be understood as assenting thereto, it not, in my opinion, being necessary to a decision of the present motion and appeal to determine the question, as the case comes under section 18 rather than 19. I think the appeal was, under the circumstances, in time.

GALT, J., concurred in the judgment of ROSE, J.

Appeal allowed.

WILSON V. ROBERTS.

Costs—Damages—Libel—Rule 428, O. J. A.

Where in an action of libel a verdict for \$1 damages was found, and the Judge at the trial gave no certificate for costs.

Held, that the plaintiff was entitled to tax full costs.

Garnett v. Bradley, 3 App. Cas. 944, considered and followed.

[January 6, 1885.—*The Queen's Bench Division.*]

THIS was an appeal (enlarged before the Divisional Court by a Judge in Chambers) by the defendant from the taxation of the costs of the action.

The facts appear in the judgment.

H. J. Scott, Q. C., for the appellant.

Aylesworth, for the plaintiff.

WILSON, C. J.—An action for libel.

The jury found a verdict for the plaintiff with full damages.

I dealt at the trial with the costs in this way: "I give judgment for the plaintiff on the above findings, and for the damages, with costs such as the plaintiff may by statute be entitled to tax, without a special certificate in his favour for full costs, which special certificate I do not give."

My object in deciding as I have noted was, that I should not either help or prevent either party from getting such costs as he might be entitled to by law.

The question now arises, what costs is the plaintiff entitled to (if any) at law?

The plaintiff says the note on the pleadings *gives* the plaintiff such costs as he can get without a certificate, and that he does not require a certificate; that the costs are to "follow the event," and the event is that he has a verdict in his favour, and he is therefore entitled to full costs. Rule 428, and the case of *Garnett v. Bradley*, 3 App.

Cas. 944, H. L., were referred to. The case just mentioned was an action for slander, and it was contended that the costs in such an action were still governed by the Statute of James, (21 Jac. I., ch. 16.)

The House of Lords decided otherwise, and the reasons for so deciding, are such as apply to libel and to all other actions as well as to slander.

The motion being to set aside the taxation of the Master who has allowed the full costs of the action to the plaintiff, we must discharge it, with costs.

ARMOUR and O'CONNOR, JJ., concurred.

Appeal dismissed, with costs.

MCDONELL V. THE BUILDING AND LOAN ASSOCIATION.

Costs, scale of—Rule 515, O. J. A.—Law Reform Act, 1868—Illegal distress—Injunction—Damages.

The defendants under a mortgage for \$2,300, made by plaintiff's father and containing a distress clause, distrained the plaintiff's goods for interest amounting to \$112.55.

The plaintiff claimed that the distress was illegal and should be set aside, that the defendants should be enjoined from selling the goods distrained, and that the plaintiff should be paid \$200 damages, or if the distress should be held legal, that the plaintiff should be subrogated to the right of the defendants under their mortgage, as against the mortgagor.

The Judge at the trial found in favour of the plaintiff, assessing the damages at \$25, and granting the injunction prayed for; but this judgment was reversed by the Divisional Court and judgment for defendants was ordered to be entered, with costs.

Held, that the action was not one that could properly have been brought under the equity jurisdiction of the County Court before the passing of the O. J. A. and Law Reform Act, 1868, though the arrears of interest and the damages found by the learned Judge were less than \$200; and therefore the case did not come under Rule 515, O. J. A., and the costs should be taxed on the scale of the High Court.

[September 2, 1886.—Cameron, C. J.]

THIS was an appeal from the taxation of the defendants' bill of costs by Samuel B. Clark, one of the taxing officers.

of the Supreme Court of Judicature, under the following circumstances: The plaintiff brought his action against the defendants for an alleged wrongful distress of the plaintiff's goods under a mortgage for \$2,300 containing a provision authorizing a distress for arrears of interest and instalments of principal. The mortgage was made by one Ronald R. McDonell, the father of the plaintiff, to the defendants.

In the plaintiff's statement of claim, he claimed to have it declared that the distress of the plaintiff's goods was illegal and void: that it should be set aside: that an interim injunction to restrain the sale of the goods distrained, obtained by the plaintiff, should be made perpetual: that the plaintiff should be paid \$200 damages for the illegal distress, or in the event of the Court holding the distress legal, that the plaintiff should be entitled to the benefit of the defendants' mortgage security to the extent of the value of the goods sold.

On taking out the writ of summons, the plaintiff's solicitors endorsed on the writ and copy filed the following certificate:

"I hereby certify to the best of my judgment and belief, the tariff of fees under the orders of the Court of Chancery of the 10th September, 1869, is applicable to this case. Dated 10th October, 1885 MacLennan & Liddell, plaintiff's solicitors."

At the trial, the learned Judge before whom the case came on to be tried gave judgment in favour of the plaintiff, assessing the damages at \$25, and directed that the injunction to restrain the sale should be made perpetual, and that the defendants should pay the plaintiff full costs.

This judgment was afterwards reversed by the Common Pleas Divisional Court on motion, and judgment for the defendants was ordered to be entered with costs. (10 O. R. 580.)

On the back of the copy of the writ of summons served, there had been an endorsement of the above certificate, which was struck out and the defendants had no notice

of the certificate other than the notice with the filing thereof would give, that is they had no actual notice, but merely constructive notice flowing from the act of filing the certificate.

The taxing officer, assuming that order 554 of the Chancery Orders, 1 *Holmsted's* R. & O. 336, was in force and applied to the case, taxed the defendants the costs that would formerly have been taxed, under order 553 of the 10th September, 1869, in suits instituted under the equity jurisdiction of the County Court, as provided by rule 515, Ontario Judicature Act.

Allan Cassels, for the appeal.

Douglas Armour, contra.

CAMERON, C. J.—Rule 515 would seem to cover the case if the action can, in the language of sub-section 8, of section 34, ch. 15, Consol. Stat. U. C., be treated as an action brought by a “person seeking equitable relief for, or by reason of any matter whatsoever, where the subject matter involved does not exceed the sum of \$200.” The claim for damages being in respect of an illegal or unlawful trespass is a purely common law demand, that could not have been enforced in a court of equity before the Ontario Judicature Act, and though a court of equity may award damages, where the damages are not the basis of the action, but an incident to the relief sought and essential to the doing of complete justice, this rule could hardly have been made with the object of extending it to other than cases formerly pertaining exclusively to Chancery. But whether it was so made or not, it cannot apply unless the action could have been brought under the equity jurisdiction of the County Court, and it could not have been brought under that jurisdiction if the subject matter involved exceeded the sum of \$200. What is the subject matter in the present case involved in this action? There is not one but several matters involved. There is first, the right of the defendants to distrain for arrears of

interest and principal, and secondly, the right to damages. The extent of the damages is not defined, the damages would be such as a jury might award for the wrongful act, not necessarily by the actual pecuniary loss sustained, and which the plaintiff claims to be \$200, and the plaintiff claims the right, if bound to pay the rent, to be subrogated to the right of the defendants under their mortgage, as against the estate of the mortgagor in the mortgaged premises. It does not appear to me, the mortgage being for a very large amount in excess of \$200 and involving the right of distress and damages for the distress, that the action is one that could properly have been brought under the equity jurisdiction of the County Court before the passing of the Judicature Act 1881, and Law Reform Act of 1868, though the arrears of rent* and the damages found by the learned Judge are less than \$200. I am therefore of opinion the defendants' costs should be taxed upon the Superior Court scale and the Master was wrong in not so taxing. His taxation will therefore be set aside, and the costs taxed on the higher scale.

*The arrears of interest for which distress was made amounted to \$112.55.

THOMAS V. STOREY.

Evidence—Issue of forgery—Examination of party abroad—Ex parte order.

No order of any moment should be made *ex parte*, except in a case of emergency.

The point in dispute in the action was as to the genuineness of a document, which the plaintiff alleged to be a forgery, obtained either by imitation of his signature, or by personation.

Held, that no order should be made which would have the effect of saving the plaintiff from personal attendance at the trial, and examination before the Court and jury.

[September 7, 1886.—*Rose, J.*]

AN appeal by the defendant from an order of the Local Judge at Picton, directing the examination of the plaintiff *de bene esse* as a witness on his own behalf, before a special examiner of this Court.

The facts appear in the judgment.

Aylesworth, for the appeal.

Holman, contra.

ROSE, J.—The plaintiff resides in the city of Oskaloosa, in the State of Iowa, and sues the defendant as administrator, with the will annexed, of the late T. P. Ellsworth, for the amount of a legacy bequeathed to one Arthur Ellsworth and assigned to plaintiff.

The defendant claims to have paid the legacy to the legatee, relying on a document purporting to be a re-assignment by the plaintiff.

The plaintiff denies the genuineness of this document.

The issue will therefore be, whether the document is a forgery, either by reason of an imitation of the plaintiff's signature or the personation of the plaintiff.

The plaintiff was in Ontario, and being about to return to his home, this order was obtained in order to save the expense of examination in the States.

The defendant's counsel contends that it is not in the interest of justice that such an order should be made, as

the defendant desires to have the plaintiff in person before the jury at the trial, to confront him with witnesses who may be able to identify him, or to say if there has been personation; and further, to allow the jury to witness his demeanor in the box under cross-examination.

The defendant examined the plaintiff while he was here under the usual order.

It seems to me this case shews the wisdom of declining, except in a case of emergency, to grant an order of any moment *ex parte*. I am sure, had cause been shewn, the order would not have been made.

From the material used on the application, I would judge that it was based on the supposition that an order for examination of the plaintiff out of the Province would have been made almost as a matter of course. In my opinion this was an error, for, as it seems to me on reference to the authorities, the Court could not, in the rightful use of discretion, have made an order saving the plaintiff from personal attendance at the trial and examination before the Court and jury. The case of *Lawson v. Vacuum Brake Co.*, 27 Ch. D. 137, is an authority against such an order.

At page 143, Cotton, L. J., says: "There is a great difference between a plaintiff and a mere witness, as to being examined abroad. If a plaintiff wishes to be examined as a witness on his own behalf, unless there are very strong positive reasons for his not coming over here, leave will not be given to examine him abroad, but he must come here."

I have been referred to no case where, on such an issue as here, the party pleading the forgery has been examined abroad. I asked counsel if any such authority existed, and they knew of none.

Apart from authority, it would seem very clear that the difference in expense of coming from Oskaloosa to Picton and returning, and of a commission to take evidence, or an examination under an order, would not be a ground for such an order.

I refer also to *Berdan v. Greenwood*, 20 Ch. D. 764, and *Crofton v. Crofton*, 20 Ch. D. 760, cited by Mr. Aylesworth and by counsel in *Lawson v. Vacuum Brake Co.*, supra.

I think the order should not have been made, and must be set aside. Costs to the defendant in any event of the cause.

TOMLINSON ET AL. V. THE NORTHERN RAILWAY COMPANY
OF CANADA ET AL.

Costs—Third party—Indemnity—Rules 107, 108, O. J. A.

The defendants, being sued as carriers for the loss of goods in transit under a contract between the plaintiffs and defendants, gave notice under Rules 107 and 108 to the third parties that they claimed indemnity from them, under a contract to which the plaintiffs were strangers; the third parties appeared, and an order was made that they should be at liberty to assist in defending the action and should be bound by the result as regards the liability of the defendants to the plaintiffs. The plaintiffs were nonsuited at the trial.

Held, that the plaintiffs were not liable for the costs of the third parties, or for the costs occasioned by joining them; nor were the defendants liable for such costs.

[September 11, 1886.—*Armour, J.*]

THE plaintiffs sued the defendants for the loss of certain horses which the defendants had contracted to carry from Tottenham, on the line of their railway, to Winnipeg, Manitoba, and which were destroyed by the burning at the wharf at Duluth, of "The City of Winnipeg," a steamer of the Canada Lake Superior Transit Company, which had them on board in the course of such carriage.

The defendants could carry the said horses on their own line as far as Collingwood only, but by arrangement which they had made with the other carriers, they were enabled to contract for the carriage of them to Winnipeg. One of such other carriers was the Canada Lake Superior Transit Company, which carried them from Collingwood to Duluth, and by the agreement made between the defendants and

the Canada Lake Superior Transit Company, it was stipulated that all loss or damage to persons or property in transit, should be paid for by the party in whose custody the loss or damage occurred.

The defendants, upon being sued, gave notice to the Canada Lake Superior Transit Company that they claimed to be indemnified by them against the loss sued for, under the terms of the said agreement, and requiring them to appear as provided for in Rules 107 and 108 of the O. J. Act.

The Canada Lake Superior Transit Company thereupon appeared in obedience to the said notice, and thereupon the defendants applied for and obtained an order, made after hearing counsel for the plaintiffs and for the Canada Lake Superior Transit Company, that the said the Canada Lake Superior Transit Company should be at liberty to intervene in this action, and dispute the liability of the defendants to the plaintiffs, and to appear at the trial by counsel and assist the defendants thereat in disputing the plaintiffs' claim against the defendants, and that they should be (as between themselves and the defendants) bound by any judgment the plaintiffs might recover therein, so far as regarded all questions of fact and law which might be decided therein, and that the costs of and arising incidentally to the application and occasioned by the addition of these as third parties should be reserved to be disposed of at the trial.

At the trial Armour, J., nonsuited the plaintiffs, and an application was then made to him for the disposal of the costs reserved by the said order, which he reserved for future consideration.

W. H. P. Clement, for the plaintiffs.

Boulton, Q. C., for the defendants.

Tilt, Q. C., for the third parties.

ARMOUR, J.—I have examined all the authorities I have been able to find upon the subject of third party costs,

including *Beard v. The Credit Valley R. W. Co.*, 9 O. R. 616, which was much relied upon by the third parties, and I have come to the conclusion that I cannot properly order the plaintiffs to pay the costs of the third parties in this action.

Why should the plaintiffs be saddled with two sets of costs? To begin with, I think it was wholly unnecessary that two sets of costs should have been incurred. The whole defence should have been undertaken by the Canada Lake Superior Transit Company, as the horses were in their custody when lost. If this suit had been brought before the passing of the Judicature Act, the defendants would in all probability, and according to the usual course in such cases, have handed the writ over to the Canada Lake Superior Transit Company, who would have undertaken the defence of the action, as they were responsible for the ultimate result of it.

Was it intended by the Judicature Act that in such a case as this a plaintiff should be liable not only to the costs of a defendant with whom he had a contract, which he alleged the defendant had broken, and for which alleged breach he had brought his action against him, but also to the costs of a third party, with whom he had no contract, and who was a perfect stranger to him, merely because the defendant had a contract with such third party to indemnify him? I think not.

It is contended that the plaintiffs ought to pay these costs, because it is said they were the authors of the litigation, but of what litigation were they the authors? Of the litigation with the defendants they were certainly the authors, but they were certainly not the authors of the litigation with the third parties, with whom they had no contract, and who were strangers to them, and against whom they had brought no action.

It is to my mind so unjust and unreasonable that the plaintiffs should be made to pay these costs that it seems to me that no authority is needed to support my refusal to do so, but if authority were needed, *Williams v. South*

Eastern R. W. Co., 26 W. R. 352, fully supports such refusal.

I do not see any reason for making the defendants pay these costs; they had the right to take the course they did in giving notice to the third parties, and in applying for the order that was made, and I think they and the third parties were equally to blame for two sets of costs having been incurred.

I dismiss the application to make the plaintiffs pay these costs, with costs.

I refer to *Witham v. Vane*, before Fry, J., 28 W. R. 812, in Appeal, 44 L. T. N. S. 718, and in the House of Lords, 32 W. R. 617.

RE O'HERON.

Insurance—Benevolent Society—47 Vic. ch. 20, (O.)

The statute 47 Vic. ch. 20, (O.,) does not apply to Benevolent Societies incorporated under R. S. O. ch. 167.

[September 21, 1886.—*Proudfoot, J.*]

THIS was an application for payment out of Court, to the persons who should be deemed entitled, of certain moneys paid in by the Canadian Order of Home Circles, a Benevolent Society incorporated under R. S. O. ch. 167.

Morris O'Heron, deceased, was a member of this society, and the holder of a certificate by virtue of which his children, named therein as beneficiaries, were to be entitled upon his death to the amount named therein, and as therein apportioned.

Subsequent to the date of the certificate, Morris O'Heron executed a will in which he made a different apportionment of the moneys under the certificate from that of the certificate itself.

The society was not authorized in any way to do business as an insurance company.

A contest having arisen among the children after the death of O'Heron, the society paid the money into Court, and this application was now made for payment out.

John Hoskin, Q.C., for the beneficiaries benefited by the will, contended that the provisions of 47 Vic. ch. 20 (O.), applied to this society, and that under sec. 6, "an apportionment made by will shall prevail over any other."

Hoyles, for the beneficiaries injuriously affected by the will, contra.

PROUDFOOT, J., held that the Act 47 Vic. ch. 20 (O.) did not apply to benevolent societies incorporated under R. S. O. ch. 167, and made the order for payment out of the moneys according to the certificate.

MORROW ET AL. V. CONNOR ET AL.

Municipal councillors—Misconduct—Trustees—Equitable jurisdiction—Jury notice—Parties.

Action by two ratepayers on behalf of themselves and all other ratepayers of A. against all the members of the Municipal Council of A., charging that the defendants, acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality.

Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustees;" that the action was one in the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper.

Semble, the municipal corporation should have been made a party to the action, and the action should have been on behalf of all ratepayers, except the defendants.

[September 21, 1886.—*Proudfoot*, J.]

THIS was an appeal by the defendants from an order of the local master at Barrie, striking out the jury notice.

The facts appear in the judgment.

A. H. Marsh, for the appellants.

W. H. P. Clement, for the plaintiffs.

Pawson v. The Merchants Bank, 11 P. R. 72, and *Conmee v. The Canadian Pacific R. W. Co.*, 12 A. R. 744, were referred to.

PROUDFOOT, J.—This action, brought by two ratepayers on behalf of themselves and all other ratepayers of the township of Adjala, against all the members of the municipal council of the township, charges them with continuing a treasurer in office who was, to their knowledge, a defaulter; and allowing him to receive further money, so that ultimately \$8,000 was lost to the municipality, the sureties escaping liability from the conduct of the defendants in not notifying them of the misconduct of the treasurer. The statement of claim charges that the defendants acted fraudulently, and in collusion with the treasurer.

The defendants say that the plaintiffs are not the proper persons to bring the action, but it should have been brought by the municipal council.

The plaintiffs reply that before action they requested the municipal council to bring the action in their name, which they refused.

The defendants served a jury notice, which was struck out by the local master at Barrie, on the application of the plaintiffs.

The defendants appeal on the ground that this, before the Judicature Act, would have been a proper action to bring in the common law Court, and that defendants are entitled as of right to a jury. They also say that it should have been alleged that the council refused to bring the action in collusion with the defendants; and that the municipal council ought to be parties plaintiff or defendant; and that the action alleges nothing about trusteeship.

It is not necessary to use the word *trustees*, if it appear

in fact that the defendants are trustees. Here it appears that they are the members of the council, and the law attaches to that character the liability of trustees. The arguments that the *council* should have been charged to have acted in collusion with the defendants, and that the council should be parties, are proper enough objections on demurrer, but do not affect the question of the right to a jury. It seems to me clear, I may say, that the council must be parties. The other point may involve more difficulty, as it appears that the defendants are the council and the defendants are charged with collusion with the treasurer.

Upon the main question, however, I think the action one that was of the proper competence of a Court of equity before the Judicature Act. I do not recollect any instance of an action at law brought by a ratepayer on behalf of himself and the other ratepayers; and the cases quoted in *Buckley* on Joint Stock Companies, 437, 438, are all suits in equity. Misconduct in trustees was always the subject of suits in equity. The defendants therefore had no right to insist upon a jury, and the order appealed from was right.

I may notice that the action is defective in another respect, as it purports to be by the plaintiffs on behalf of themselves and all the other ratepayers. The defendants are alleged to be councilmen, and must be ratepayers. They are thus made co-plaintiffs against themselves. The plaintiffs should have sued on behalf of all the ratepayers except the defendants.

But this appeal is dismissed, with costs.

RE FLEMING.

Executor—Compensation—R. S. O., ch. 107, secs. 37; 41.

The order of FERGUSON, J., *ante* p. 272, reversed, and the Master's report restored.

Held, that the right of an executor to compensation depends entirely upon R. S. O., ch. 107, secs. 37, 41, and as that statute has fixed no standard, each case is to be dealt with on its merits, according to the discretion of the Judge. The Courts have laid down no inflexible rule in this regard, and the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute.

Held, also, that there was no duty cast upon the petitioner which required him to act against the interests of his co-executor, nor did he incur any appreciable additional risk or responsibility, and he was therefore not entitled to a larger share of the commission awarded..

[September 22, 1886—*The Chancery Division.*]

THIS was an appeal by W. Magrath, one of the executors and the principal devisee and legatee under the will of Charles Magrath, deceased, from the order of Ferguson, J., *ante* p. 272, allowing Magrath's co-executor, Fleming, a commission of three and one-half per cent. upon the portion of the estate got in and paid over, as compensation for his care, pains, &c., in and about the estate.

The facts are stated in the former report.

A. C. Galt, for the appellant.

S. H. Blake, Q.C., and Goodwin Gibson, for the respondent.

BOYD, C.—The right to compensation in this case depends entirely upon the statute, which declares that a trustee or executor shall be entitled to a fair and reasonable allowance for his care, pains, and trouble, and his time expended in and about the trust estate (R. S. O. ch. 107, secs. 37, 41), and generally in arranging and settling the affairs of the estate. The statute has fixed no standard by which the rate of compensation is to be measured, and this imports that each case is to be dealt with on its merits, according to the sound discretion of the Judge, who is to regard the

care, pains, trouble, and time bestowed and expended by the claimant. Nor have the Courts laid down any inflexible rule in this regard. While a percentage has been usually awarded as a convenient means of compensating a class of services which do not admit of accurate valuation, yet the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute.

I need not go beyond *Thompson v. Freeman*, 15 Gr. 384, to indicate the point upon which I think the judgment in appeal should be reversed. Five per cent. commission may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility, such a rate may be excessive. The Chancellor and Vice-Chancellor in that case agreed that regard should be had to the amounts passing through the hands of the executors, and the case of sheriff's poundage is referred to as embodying a principle of reducing the scale of allowance as the amount increases, which may well be applied to executorial commissions.

This principle has since been extended by the Legislature and the Courts in many analogous cases, such as to the assignee of an insolvent estate (38 Vic. ch. 16, sec. 43 (D.) and to all fees and costs in administration and partition matters (G. O. Chy. 643).

In this case the Master has allowed at the full rate of five per cent. on the sum of \$32,000, which was invested in mortgages, and which involved a little more trouble and responsibility than the rest of the estate, but he has only allowed at the rate of one per cent. to the executor on the residue of the estate, consisting of debentures and specific securities to the value of \$79,000. These were simply transferred or assigned by this petitioner to his co-executor, who was the beneficial legatee of all the property. In this the Master has properly discriminated, and while I feel that the whole sum allowed (\$1,600) is one which errs on the side of liberality, I am not disposed to scrutinize it minutely for the purpose of reduction, although I might not personally have fixed so much in the first instance.

The learned Judge has divided the five per cent. awarded by him unequally between the executors, so as to give one per cent. more to Fleming. I do not agree in this, as I see no duty cast upon Fleming by the so-called *precatory* clauses of the will which required him to act against the interests of his co-executor. The property bequeathed to the co-executor was impressed with the charge in favour of the widow as effectually as was intended by the testator, and no action was needed on the part of Mr. Fleming to strengthen her claim thereto. In other respects the risk or responsibility which attached upon Mr. Fleming, as compared with his co-executor, is not very appreciable, inasmuch as, subject to the charge in favour of the widow, the whole estate was practically at home in the hands of Mr. Fleming's co-executor upon the death of the testator.

I think the appeal should be allowed, and the Master's report restored, without costs, as the appellant has failed in his cross-appeal to diminish the sum given by the Master.

PROUDFOOT, J., concurred.

Appealed allowed, and Master's report restored.

MCBEAN V. MCBEAN ET AL.

Admissions, withdrawal of—Reference—Account.

A defendant was allowed to attack certain items in an account, which, in the course of a reference, had been admitted to be correct by his former solicitor, since deceased, where the defendant swore that he had not authorized the admissions, and that the items were not properly chargeable against him, and where it was shewn that no report had been made and no change had taken place in the position of the parties by reason of the admissions.

[September 23, 1886—*Proudfoot, J.*]

THIS was an appeal by George McBean, one of the defendants, from an order of the local Master at Cornwall, refusing to allow the appellant to withdraw certain admissions made by his former solicitor, now deceased.

The action was brought for the purpose of having partnership accounts taken, and a reference for this purpose was directed to the Master. In the course of the reference, the solicitor for the appellant admitted the correctness of certain items in the plaintiff's account; but after the death of the solicitor, the appellant applied to the Master for leave to withdraw the admissions, swearing that he had not authorized the deceased solicitor to make them, and that the admitted items were not properly chargeable against him; but the Master refused to allow the withdrawal.

No report had been made, and the other parties to the action had not altered their position in any way in consequence of the admissions.

S. H. Blake, Q.C., for the appellant, cited *Wharton's Evidence*, sec. 1185; *Taylor on Evidence*, secs. 817, 854; *Dewar v. Orr*, 3 Ch. Chamb. R. 224; *Devlin v. Devlin*, *ib.* 491; *Daniell's Ch. Pr.*, 6th ed. 687; *Holt v. Jesse*, 3 Ch. D. 177.

Hoyles, for the plaintiff, referred to *Greenwood v. Atkinson*, 4 Sim. 54; *Wright v. Way*, 8 P. R. 326; *Williams v. Preston*, 20 Ch. D. 672.

D. W. Saunders, for the defendant Donald McBean, cited *Furnival v. Bogle*, 4 Russ. 142.

PROUDFOOT, J., thought that it would be too rigid a rule to lay down, that a party should never be allowed to withdraw admissions. In the circumstances of this case the appeal should be allowed to the extent of suffering the appellant to attack the items admitted, the items to be regarded as *prima facie* correct, and the *onus* of displacing them to be upon the appellant.

As it appeared that the appellant had been ordered to pay the costs of the application before the Master, no costs of this appeal were allowed to any of the parties.

RE WOLTZ V. BLAKELY.

Prohibition—Division Court—Imprisonment—Division Court clerk.

The order of a Division Court Judge upon judgment summons directed that the defendant should pay the judgment debt within a fixed period, and in default that he should be committed to gaol.

Held, that the part of the order as to imprisonment was not sustainable; the defendant, if he did not pay within the time limited, was entitled to a day to shew cause why he did not pay; and prohibition was ordered.

Semble, the defendant should have called upon the clerk of the Court to shew cause against the issuing of any order for imprisonment, as such order is merely a ministerial act.

[September 24, 1886.—*Wilson*, C. J.]

JUDGMENT was recovered in the Division Court at Woodstock against the defendant on the 2nd of December, 1884, and execution was issued on the 27th of January, 1885. In February, 1885, the defendant was examined on a judgment summons, and was discharged from it upon his examination. In January, 1886, a second judgment summons was issued against him. On the 2nd of March, 1886, the defendant paid into Court \$50, and \$2.87 for

costs, in full of claim. On the 23rd of June, 1886, the Judge of the Division Court ordered that the defendant should pay the balance of the judgment, that is the amount of it less the \$50 and costs paid into Court, such balance to be paid within twelve days, and in default thereof that he be committed to gaol for the period of thirty days. The order of the Judge stated that the defendant was sworn "touching and concerning the matters which he has been so summoned for examination, and that on such examination the defendant did not make answer touching such matters to my satisfaction. Now, therefore, I, the Judge of the said Court, order, &c."

The defendant moved for a prohibition to the Judge of the Division Court to stay him from acting upon this order, or authorizing or permitting proceedings to commit the defendant thereupon, because, however rightfully the order upon the defendant to pay the residue of the judgment debt may have been made, the order should not have directed committal in default of payment, for the defendant in case of default would be entitled to a further day before committal to shew cause why he should not be committed.

The defendant also sought to prohibit the Judge from acting upon the order for payment on the ground that the suit had been settled, and on other grounds unnecessary to mention.

Reeve, Q. C., for the motion.

Aylesworth, contra.

The following cases were cited: *Ex parte Kinning*, 4 C. B. 507; *Kinning v. Buchanan*, 8 C. B. 271; *Abley v. Dale*, 10 C. B. 62; *Dews v. Riley*, 11 C. B. 434; *Chichester v. Gordon*, 25 U. C. R. 527; *Walsh v. Ionides*, 1 E. & B 383; *Kerkin v. Kerkin*, 3 E. & B. 399.

WILSON, C. J.—The order of the learned Judge of the Division Court was not the order which should have been

made. The part of it as to the imprisonment is not sustainable. The defendant if he did not pay within the twelve days was still entitled to a day to shew cause why he did not pay. That part of the order has not been acted upon, and I think the learned Judge could have amended his order by striking out that part. It is not intended to act upon it. The defendant is however entitled to be protected against that part of the order, and the writ must go as to that part. The defendant should strictly upon this motion have called upon the Clerk of the Court to shew cause against the issuing of any order for imprisonment, as such order is merely a ministerial act: *Dews v. Riley*, 11 C. B. 434.

* * * * *

The whole case then is, that the part of the order relating to imprisonment must not be acted upon, but will be prohibited, and the motion must be discharged as to the residue (a) * * The order will therefore be that the plaintiffs be restrained from acting upon so much of the order founded on the judgment summons as provides that the defendant be imprisoned for thirty days in case he shall make default in payment of the said judgment debt at the time therein mentioned, and that the residue of the said motion be dismissed, and that the parties be entitled to receive and to pay costs of this motion according to the respective parts of the said motion on which the parties respectively have succeeded.

(a) The judgment also dealt with the part of the motion which asked prohibition upon the order for payment.

SHERWOOD ET AL. V. GOLDMAN.

Writ of summons—Irregularity—Residence—Form 1, O. J. A.

A writ of summons not indorsed with a statement of the plaintiff's residence, as set out in Form 1, O. J. A., is irregular.

[September 28, 1886—*The Master in Chambers.*]

THE action was commenced by writ of summons, upon which the plaintiffs' solicitor had failed to endorse the residence of the plaintiffs, in accordance with Form 1, O. J. A.

The defendant moved to set aside the writ of summons, copy, and service, on the ground of irregularity, and for security for costs, upon affidavits shewing that the plaintiffs resided out of the jurisdiction.

Small, for the motion, referred to *McCreedy v. Hennessy*, 9 P. R. 489.

Baird, contra.

THE MASTER IN CHAMBERS held that the writ was irregular by reason of its not following the form, and that the meaning of the words of the form, "This writ was issued by E. F., of——, solicitor for the said plaintiff, who resides at——," was that the residence of the plaintiff himself should be given.

An order was made for the amendment of the writ, and for security for costs.

Costs of the application to be costs in the cause to the defendant.

THE BANK OF BRITISH NORTH AMERICA V. THE WESTERN
ASSURANCE COMPANY.

*Opening up case—Discovery of fresh evidence—Jurisdiction of trial Judge—
R. S. O. ch. 38, secs. 22, 46.*

An application to open the case and put in further evidence, and for a new trial upon fresh evidence, or for leave to bring a new action upon a part of the original claim founded upon such evidence, is properly made to the Judge who heard the original cause.

Semble, R. S. O. ch. 38, sec. 46, would have the effect of preventing an appeal from a judgment more than a year old, unless leave were obtained from the Court of Appeal; but if new evidence were admitted, and the case heard anew, the time for appealing would run from the date of the later judgment.

Semble, also, R. S. O. ch. 38, sec. 22, was not intended to apply to newly discovered evidence.

Synod v. DeBlaquiere, 10 P. R. 11, followed.

[September 29, 1886—*Proudfoot, J.*]

IN this case, reported 7 O. R. 166, Proudfoot, J., on the 25th June, 1884, found that the plaintiffs were not entitled to recover a sum of £1,500 stg. from the defendants, under the circumstances there stated.

An application was now made by the plaintiffs, before Proudfoot, J., in Court, for an order opening up the judgment, and allowing the plaintiffs to put in further evidence, and for a new trial; or for an order allowing the plaintiffs to put in further evidence and for leave to appeal from the said judgment with such further evidence put in; or for an order allowing the plaintiffs to appeal from the said judgment notwithstanding lapse of time; or for an order allowing the plaintiffs to bring a further action against the defendants for the balance of £1,500 stg., the amount for which the defendants were allowed credit in the present action; or for such other order as shall seem fit, upon the grounds disclosed in the affidavits filed.

This motion was dated the 8th of April, 1886.

A preliminary objection was taken that the learned Judge had no jurisdiction to open up the case, or to give leave to appeal: that the Appeal Act (R. S. O. ch. 38, sec. 46), required an appeal from the Court of Chancery to be

brought within a year, which could not now be done, or within such further time as might be allowed by the Court of Appeal: that since the Judicature Act, rule 510, where a Judge in a non-jury case has directed that judgment be entered, an application to set aside the judgment and to enter any other judgment, upon the ground that the judgment so directed is wrong, may be made to a Divisional Court, or to the Court of Appeal: that by sec. 28, sub-sec. 3, O. J. A., a single Judge constitutes a Court, and a single Judge cannot interfere.

The preliminary objection was first argued.

S. H. Blake, Q.C., for the plaintiffs.

McCarthy, Q.C., and *A. R. Creelman*, for the defendants.

PROUDFOOT, J.—The objections apply only to some, not to all of the different reliefs asked for. If there are any of them that may be granted, the objection must be overruled.

The main ground of the application is to open the case, and to put in further evidence, and, as a necessary consequence, for a new hearing, not of the original cause, but of the cause with the new evidence. It is an application which is made to the indulgence of the Court, and properly made to the Judge who heard the cause. I am unable to distinguish the case from *Synod v. DeBlaquiere*, 10 P. R. 11, where a similar preliminary objection was made, and overruled. I there remarked that there was no provision in the Judicature Act specifically applicable to the subject, and therefore the original practice of the Court remained; and in that case the judgment had been affirmed both in the Court of Appeal and in the Supreme Court. Judicature Act, rule 510, does not apply to such a case, where the judgment is sought to be varied by new evidence.

I quite agree that if the application had been simply to reverse the judgment, or to rehear it upon the same materials as were before me when I heard the case, there would have been no jurisdiction to interfere, and the remedy must have been sought in the Divisional Court, or in the Court of Appeal.

And as to that branch of the application which asks for leave to bring an action for the £1,500, upon the ground of new evidence, there seems no reason why it may not be adjudicated upon by the Judge who heard the cause. It is, in truth, the main motion in another shape. If it would be right to open up the cause to admit new evidence, which might result in rendering the defendants liable to pay the £1,500, what objection can there be to allowing an action for the £1,500, by reason of the new evidence.

The Appeal Act (R. S. O. ch. 38, sec. 46) may probably have the effect of preventing an appeal from the present judgment, without the leave of the Court of Appeal; but if new evidence is admitted and the case heard anew, the time for appealing would run from the date of the later judgment.

Nor do I think that the provision in the Appeal Act, sec. 22, giving a discretionary power to the Court of Appeal to receive further evidence on questions of fact was intended to apply to newly discovered evidence.

The right to adduce such evidence would have to be the subject of a substantive application. The power to receive further evidence would apply to a fuller examination of witnesses already examined, or to evidence that had been improperly rejected. But however that may be, the power given to the Court of Appeal does not, in my opinion, deprive the party of the right to apply to the Judge who heard the cause.

I overrule the objection.

The motion was subsequently argued on the merits, before the same Judge and judgment was delivered on October 23, 1886, refusing the motion.

GILMORE V. THE TOWNSHIP OF ORFORD ET AL.

Writ of summons—Indorsement—Claim.

The writ of summons was issued against three defendants, O., A., and R.

The indorsement claimed to have set aside a deed from A. to O., and a deed from O. to A. No claim whatever was made against R. and he was not mentioned in the indorsement.

Held, that the indorsement was sufficient, and a motion by R. to set aside the service upon him was refused.

[October 1, 1886—*The Master in Chambers.*]

THE writ of summons was issued against three defendants, viz.: the Municipal Corporation of the township of Orford, Frederick S. Atkinson, and John Reycraft.

The indorsement was as follows: "The plaintiff's claim is to have declared void a certain deed from the defendant Frederic S. Atkinson to the defendants the Municipal Corporation of the township of Orford, dated 17th July, 1886, of part of lot number 10 in the 6th concession of the township of Orford, and to have declared void a certain deed from the Municipal Corporation of the township of Orford to the defendant Frederick S. Atkinson, bearing the same date, of the town hall premises in the village of Duart, in the said township of Orford."

The defendant Reycraft moved to set aside the copy and service of the writ of summons upon him, on the ground that the indorsement disclosed no claim against him.

H. J. Scott, Q.C., for the motion. There is here no statement of the nature of the claim made against Reycraft, or of the relief or remedy required against him, as required by rule 5, O. J. A. It is impossible for Reycraft to know whether or not he should appear, as he does not know what is asked against him.

Caswell, contra. The indorsement discloses all the claim made in the action. Reycraft knows best whether or not he is interested in that claim. As a matter of fact he is interested in the lands covered by the first deed. The

indorsement complies with rule 5. If it be not sufficient, it may be amended under rule 11.

THE MASTER IN CHAMBERS.—I think the indorsement sufficient.

Motion discharged, with costs.

TINNING ET AL. V. GRAND TRUNK RAILWAY COMPANY.

Notice of trial—Plaintiffs severing—Rule 225, O. J. A.

Since the Ontario Judicature Act any one of the parties, plaintiffs or defendants, may give notice of trial.

[October 4, 1886.—*The Master in Chambers.*]

IN this action there were three plaintiffs, Richard Tinning, John Tinning, and Thomas Tinning, and the proceedings were carried on up to issue in the name of all three by Mr. Alexander MacNabb, as their solicitor. After issue an order was taken out by Thomas Tinning, changing his solicitor to Mr. MacGregor. Notice of trial for the Toronto Assizes, beginning the 4th of October, 1886, was served by Mr. MacNabb on behalf of the plaintiffs Richard and John Tinning upon the defendants and the other plaintiff, but no notice had been served on behalf of Thomas Tinning up to the 2nd of October, 1886, when

Aylesworth, for the defendants, moved to set aside the notice of trial as irregular, and to stay the proceedings until the plaintiffs should unite in some course of conduct. He contended that plaintiffs could not sever in their conduct of an action; the plaintiff Thomas Tinning, as far as appeared, might wish to take an entirely different course; he might wish to bring the case down for trial at the Chancery Division Sittings beginning on the 29th October.

MacGregor, for Thomas Tinning, stated that he concurred with the other plaintiffs in wishing to bring the case down at the Toronto Assizes.

Fowler, for Richard and John Tinning. The words "either party" in Rule 225, O. J. A., mean "any party:" *McLean v. Thompson*, 9 P. R. 553.

THE MASTER IN CHAMBERS—Since the Judicature Act, it seems to me that any one of the parties, plaintiffs or defendants, may give notice of trial, if the record be in a state to take down.

You may have many plaintiffs, and a decision against one and for another, just as you may have different decisions of the case, as respects different defendants.

Here the notice of trial has been served upon the third plaintiff. It is given on behalf of two, but the third concurs in it.

A different decision, it seems to me, would leave some of the plaintiffs at the mercy of the others. For suppose the defendants were to say to the third, we will pay you, and you can keep the others from getting down. I am putting a possible case. I know there is not the least ground for supposing it to exist here ; but a decision that all must concur might occasion embarrassment.

The case of difficulty suggested on the other side, of the third plaintiff giving a notice for the Chancery Sittings, would be very soon put right if attempted.

MURRAY V. WARNER.

Discovery—Rule 285, O. J. A.—Examination.

The plaintiff, who was the father of A. S. M., an insolvent trader, sued the assignee and trustee for the benefit of creditors of A. S. M., claiming a declaration of right to rank on the estate for a large sum.

The assignee was instructed by the creditors to resist the claim and had himself no personal knowledge of it, and could find no entry of it in the books or papers of A. S. M.

Under these circumstances an order under Rule 285 for the examination of A. S. M. by the defendant, for the purposes of discovery before the trial, was affirmed.

[October 11, 1886.—*Ferguson, J.*]

THE defendant was the assignee and trustee for the benefit of creditors of one A. S. Murray, an insolvent trader. The plaintiff, William Murray, father of A. S. Murray, claimed the right to rank on the estate for \$2,600, and brought this action for a declaration of his rights. The defendant refused to recognize this right.

The Master in Chambers made an order on the application of the defendant, allowing him to examine his assignor, A. S. Murray, for the purposes of discovery, before the trial, and the plaintiff now appealed from this order.

In support of the original application, the defendant's solicitor swore that he was informed and believed that the claim of the plaintiff did not appear in the books of A. S. Murray, and that the defendant had no means of actually knowing whether or not it was a *bonâ fide* claim; that the defendant was resisting the plaintiff's claim under the direction of the inspectors of the estate of A. S. Murray, that he had good reason to believe that A. S. Murray was aiding the plaintiff in the prosecution of this action, and that he believed it would be useless to endeavour to obtain the information sought from A. S. Murray, except by an examination under oath.

The plaintiff filed, in answer to the application, an affidavit of A. S. Murray, stating that he had never been

applied to by the defendant for information, and that he was willing to give what information he could, and an affidavit of the plaintiff's solicitor, stating that he intended to call A. S. Murray as a witness at the trial.

J. R. Roaf, for the appellant.

C. J. Holman, for the respondent.

Carnegie v. Federal Bank, 10 P. R. 69; *Carnegie v. Cox*, 11 P. R. 311; *Turner v. Kyle*, 2 C. L. T. 598; *Minkler v. McMillan*, 10 P. R. 506, were referred to.

FERGUSON, J.—I think the circumstances of this case differ much from those in *Carnegie v. Federal Bank*, and the other cases in which it has been held that Rule 285 did not apply. I agree with the learned Master in Chambers in thinking that the examination of the witness appears necessary for the purposes of justice. It may well be that the defendant, who is only an assignee and trustee, will upon reading the examination, become convinced that his present contention is wrong, and that the litigation will come to an end. He is not personally interested beyond to do what is right towards all the creditors, and has no personal knowledge of the transaction. Other reasons might be offered; but it is at present sufficient to say that I cannot set aside the Master's order.

The costs will follow the event; they will be costs in the cause to the defendant in any event of the suit.

LANDRY V. THE CORPORATION OF THE CITY OF OTTAWA.

By-law—Application to quash—Divisional Court—Single Judge.

The Divisional Court ought not to entertain applications to quash by-laws, which should be made to a single Judge.

[September 11, 1886—*The Common Pleas Division.*]

THIS was an application to the Divisional Court to quash a by-law.

During Easter sittings, June 4, 1886, *McCarthy*, Q.C., and *Clement*, proceeded to support the motion.

MacLennan, Q.C., took the preliminary objection, that this was not a matter for the Divisional Court, but for a single Judge. Secs. 28, 37, of the Ontario Judicature Act, seem clearly to shew this. Section 334 of the Municipal Act 1883 must be read in connection therewith; and where it says that the application to quash a by-law must be to the "High Court," it means before a single Judge. Under rule 471, specific matters are relegated to the Divisional Court, which do not include an application like the present one. The plan of the Ontario Judicature Act is, to require all matters that possibly can be to be brought before a single Judge: *MacLennan's O. J. Act*, 2nd ed., p. 558.

McCarthy, Q.C., contra. There is a great deal of force in what has been said by the other side, but the practice has hitherto been otherwise. Section 12 of the Ontario Judicature Act would appear to give jurisdiction, as it provides that in cases not expressly provided for by the rules, the practice shall be the same as before the passing of the Act, and the practice then was to apply to the Divisional Court, or, what was the same thing, the Court in term.

GALT, J.—By section 28 of The Judicature Act, "Every action and proceeding in the High Court of Justice, and all business arising out of the same, except as hereinafter

provided, shall, so far as is practicable and convenient, be heard, determined and disposed of before a single Judge."

By sec. 334, Municipal Act, 1883: "In case a resident of a municipality," &c., "applies to the High Court of Justice" to quash a by-law, "the Court, after at least four day's service on the corporation of a rule to shew cause in this behalf, may quash the by-law."

By section 338, it is manifest that where it is sought to quash a by-law on certain specified grounds, the proceedings must be taken before a single Judge.

It appears to me, therefore, it was the intention of the Legislature, when in the 334 section they used the term "High Court of Justice," they intended the duty thereby imposed should be exercised by a single Judge in accordance with the provisions of section 28 of The Judicature Act.

Upon referring to rule 471, it will be found that no reference is made to an application like the present.

"The following proceedings and matters shall be heard and determined before the Divisional Courts": (1.) "Appeals from orders of a Judge in Chambers." (2.) "Proceedings directed by any statute to be taken before the Court, and in which the decision of the Court is final." (3.) "Cases of *Habeas Corpus*, in which a Judge directs rule *nisi* for the writ, or the writ, to be made returnable in a Divisional Court," &c. (4.) "Other cases where all parties agree that the same be heard before a Divisional Court." (5.) "Applications for new trials."

In one case only is the jurisdiction of the Divisional Court extended beyond certain specified matters, viz.: the fourth.

In the interest of the public, it is desirable that applications to quash by-laws should be tried before a single Judge. The Divisional Court sits only three times a year, and if an application to quash a by-law is within the jurisdiction of the Divisional Court, it is manifest that a single Judge would have no power to dispose of it.

The objection is therefore sustained.

CAMERON, C. J.—I concur in the opinion just expressed that an application to quash a by-law may and ought to be made to the High Court presided over by a single Judge and not to the Divisional Court; but I do not wish to be taken to hold that the Divisional Court may not have jurisdiction to entertain such an application. Unless there is some good reason why the application should be made in the Divisional Court, it ought not to entertain it; and the fact that a Judge sitting in the single Court has already disposed of the objections to the by-law in question, at the instance of another applicant, is rather a reason for refusing to hear the present motion, as the proper tribunal to review the decisions of the single Court is the Court of Appeal.

I therefore agree that this motion should not be entertained.

ROSE, J.—I agree in the result, but also desire to leave open for further consideration the question raised as to the exact limits to be assigned to the jurisdiction of the Divisional Court.

Motion dismissed.

PICKUP V. KINCAID ET AL.

Jury notice—Issue—Account—R. S. O. ch. 50, sec. 255.

The action was for the amount of a bill for medical attendance ; no equitable issue was raised, and it clearly appeared that the only matter in dispute was the amount of the bill :

Held, a proper case for a Judge in Chambers, under R. S. O. ch. 50, sec. 255, to strike out the jury notice.

[October 25, 1886—*Ferguson, J.*]

THIS was a motion by the plaintiff (referred to a Judge in Chambers by the Local Master at Brockville) to strike out a jury notice filed and served by the defendants.

The action was by a physician upon his bill for services rendered to a deceased person against the executors of the deceased, his two sons.

The statement of defence alleged that the services of the plaintiff had not been engaged by the deceased, and that the bill was excessive.

The defendants admitted upon their examination that the plaintiff had rendered services to the deceased ; that they themselves had been frequently sent by the deceased to bring the plaintiff to attend upon him, and that the only question really in dispute was as to the amount of the bill.

The plaintiff desired to get rid of the jury notice in order that he might go to trial at the Sittings at Brockville for trial of actions in the Chancery Division, which were to begin on the 1st of November, and for which no jury was to be called, the Assizes for Brockville being over.

Hoyles, for the motion. Upon the pleadings and examination it appears clearly that the issue is simply as to amount. It is such a question as will undoubtedly be referred to the Master : *Williamson v. Ewing*, 27 Gr. 596; and in order that it should be promptly referred the jury

notice should be struck out. If it is retained it will throw the case over till the Spring Assizes. The plaintiff is in a position to move for and get judgment under rule 322, but it is just as simple and more expeditious for him to take the case down at the Chancery Division Sittings in his own county, where a reference can be made, and he ought to be allowed to do so. A Judge in Chambers has the same jurisdiction under sec. 255 of the C. L. P. Act to strike out a jury notice as the Judge at the trial, and this is a case in which it should be exercised by a Judge in Chambers in order to prevent delay. The cases where Judges have refused to strike out jury notices are those where there was confessedly an issue to be tried; here it is clearly proved and admitted by the affidavits and depositions that there is in fact no issue, but merely a question of account.

George Macdonald, for the defendants, contra. This is simply a Common Law action, and the defendants had the right to serve the jury notice: *Bank of British North America v. Edāy*, 9 P. R. 468; *Pawson v. Merchants' Bank*, 11 P. R. 72; *Masse v. Masse*, 11 P. R. 81; *Herring v. Brooks*, 11 P. R. 15; *Conmee v. Canadian Pacific R. W. Co.*, 12 A. R. 744.

FERGUSON, J.—It is conceded that I have under the proper practice a discretion to set aside this notice, and direct that the matters may be tried and the damages assessed without the intervention of a jury. I have heard the argument at length because it is a question of taking away what has been called the *prima facie* right of a suitor to have his case tried by a jury.

It appears to me, upon looking at the evidence that has been read to me and the pleadings, plain that the application should succeed, and the order will be accordingly. The applicant will have his costs.

FOSTER V. MOORE ET AL.

Lis pendens—Vacating registration.

Action by a creditor of M. to set aside a conveyance by M. to his wife, as fraudulent.

Held, a proper case in which to register a certificate of *lis pendens*, and that pending the action no order could be made to vacate it.

[October 25, 1886.—*Ferguson, J.*]

THIS was an action by a judgment creditor of the defendant Thomas Moore, to set aside a conveyance of land to his wife, the defendant Agnes E. Moore, as fraudulent and void against creditors.

The writ of summons was issued on the 13th of February, 1886, and immediately after its issue a certificate of *lis pendens* was obtained by the plaintiff and registered against the land covered by the impeached conveyance.

The writ of summons was not served upon the defendants till the 25th of September, 1886, and the defendants did not learn that the writ had issued or that the certificate had been registered till shortly before the service upon them.

The plaintiff excused his delay in serving the writ by shewing that he had, between the issue and the service, been engaged in endeavouring in other ways to obtain payment of the judgment debt.

The defendants appeared to the writ and on the 28th September, 1886, issued an order for security for costs, as the plaintiff lived out of the jurisdiction.

The defendant Agnes E. Moore, being anxious to effect a sale of the land in question, applied for an order to discharge the certificate of *lis pendens* and to speed the trial of the cause; and on the 16th of October, 1886, an order was made by the Master in Chambers that upon payment into Court by the defendants of \$750, a sum regarded as sufficient to cover the plaintiff's claim and costs, the certi-

ificate of *lis pendens* should be vacated. The order also contained provisions for speeding the trial of the action by shortening the time for giving security for costs, filing pleadings and serving notice of trial. The Master directed that the costs of the application should be to the defendants in any event.

The plaintiff now appealed from this order to a Judge in Chambers.

Bain, Q. C., for the appeal. A *lis pendens* properly issued and registered cannot be got rid of as long as the action is pending: there is no power to set it aside: *Sheppard v. Kennedy*, 10 P. R. 242; *Jamieson v. Lang*, 7 P. R. 404. The defendant by taking the order for security for costs waived any complaint as to delay of the plaintiff, and stayed proceedings for four weeks. The order for security for costs should not have been disturbed. The application for the order was for the benefit of the defendant Agnes E. Moore and she should not have been awarded the costs of the motion. The \$750 is entirely insufficient in amount, in view of the fact that other creditors will be entitled to share in the proceeds of these lands if the conveyance be set aside.

E. Douglas Armour, for defendant. It was not objected before the Master that he had no power to make the order. The registration of the *lis pendens* is equivalent to an injunction, and the plaintiff should not delay unnecessarily where there is an injunction: *Finnegan v. Keenan*, 7 P. R. 385. The \$750 was to meet this claim, and the plaintiff would have a lien upon it to the exclusion of other creditors.

FERGUSON, J.—I am unable to see how the part of the order that set aside the *lis pendens* can be sustained. The suit is manifestly one in which it was proper practice to issue and register a *lis pendens*, and I think there was no power to set it aside in this way. Besides, it does not appear to me to have been established that the plaintiff

was harrassing the defendants by the *lis pendens*. As to the other parts of the order, I should be glad if the parties would avail themselves of it and have the action tried this autumn. The defendants, however, say that the present intended sale of the lands having been prevented, they do not feel called upon to assist the plaintiff in getting on with the suit. Under such circumstances I do not see my way to any course but that of allowing the appeal, which will have the effect of setting aside the order.

Appeal allowed, with costs.

HALL V. PILZ ET AL.

Mechanic's lien—Costs, scale of.

Where the plaintiff's claim in an action to enforce a mechanic's lien was only \$142, but at the time the action was begun the aggregate amount of the liens (the plaintiff's and another) registered against the property was over \$200:

Held, that the action was properly brought in the High Court of Justice, and the costs should be on the scale of that Court, and it made no difference that the other lien-holder failed to substantiate his claim.

[October 26, 1886—*Wilson*, C. J.]

ACTION in the High Court of Justice to enforce a mechanic's lien. The plaintiff's claim amounted to the sum of \$142. At the time when the action was brought there was registered against the property affected by the plaintiff's lien a second mechanic's lien for \$130, which appeared to have been regularly filed, and upon its face constituted a valid lien upon the property. The plaintiff obtained the usual judgment, with a reference to the Local Master at Berlin. Upon the reference the Master disallowed the second lien, finding upon the evidence that it had been filed more than thirty days after completion of the work in respect of which it was claimed; and by his report the Mas-

ter found the plaintiff's lien and the mortgage of the defendant Conrad to be the only encumbrances upon the property, the plaintiff's lien being entitled to priority. The Master taxed to the plaintiff his costs of the action upon the High Court scale.

F. Colquhoun supported an appeal by the defendant Conrad from the Master's report, and contended that the plaintiff's claim being for an amount within the jurisdiction of the County Court, his costs should be taxed upon the lower scale, referring to *Smith v. McDonald*, 25 Gr. 600.

W. H. P. Clement shewed cause, and contended that as under section 15 of the Mechanic's Lien Act an action by one lien-holder "shall be taken to be brought on behalf of all the lien-holders of the same class," such action must be brought in the Court having jurisdiction to the amount of the aggregate of the claims of lien-holders of the same class, and also that sec. 12 of the same Act supports this view.

WILSON, C. J., dismissed the appeal, with costs, holding that where the aggregate of apparently valid liens exceeds \$200, an action by any one of the holders of such liens should be brought in the High Court; and that the failure of the second lien-holder to substantiate his claim should not operate to deprive the plaintiff of his right to costs on the higher scale.

BROMLEY V. GRAHAM.

Production—Privilege—Affidavit of documents—Criminal libel.

To obtain privilege for a document mentioned in an affidavit on production, the grounds upon which it is claimed must be stated.

A statement that according to plaintiff's contention a document contains a libel, and therefore exposes the defendant to a criminal charge, is not sufficient to protect the document; the defendant must go further and express his belief that the production of the document will expose him to a criminal charge.

[October 28, 1886.—*The Master in Chambers.*]

THIS was an action for libel.

The defendant in his affidavit on production of documents stated that he had in his possession the letter containing the alleged libel upon the plaintiff, but that he objected to produce it. The affidavit continued "that my ground for so doing is that the said letter is a privileged communication; and also that I am not bound to produce the same in view of the plaintiff's contention that it contains a libel, and therefore exposes me to a criminal charge."

The plaintiff moved for a better affidavit and to compel production of the letter.

Holman, for the motion, referred to *Webb v. East*, 5 Ex. D. 108; *Gardner v. Irwin*, 4 Ex. D. 49; *Lamb v. Munster*, 10 Q. B. D. 110.

Douglas Armour, for the defendant.

THE MASTER IN CHAMBERS followed *Webb v. East*, supra, and held that the mere statement that the document was privileged was not sufficient; that the facts constituting the privilege should be set out that it might be seen whether or not it existed; and further that the document could not be protected by stating that the plaintiff contended it was libellous; that the defendant would have to aver his belief that the production of the document would expose him to a criminal charge. The order was made for a better affidavit and for production of the letter in question.

DEVEREUX V. KEARNS ET AL.

Partition—Sale—Dowress—Assignment of dower.

A person entitled only to dower, unassigned, out of land, is entitled to apply for partition

Rody v. Rody, 1 C. L. T. 146, overruled.

But where one only of several is desirous of partition, all that that one is entitled to is to have his or her portion set aside, leaving the others to hold jointly or in common, as before.

Hobson v. Sherwood, 4 Beav. 184, followed.

And where the dowress applied for partition or sale, confessedly with the object of obtaining the latter, and all the other parties opposed it, and it appeared that the applicant had by another proceeding obtained the right to have her dower assigned out of the lands, the application was refused, with costs.

[November 1, 1886—*Ferguson*, J.]

THIS was an application under G. O. Chy. 640 on behalf of the plaintiff, who was not interested in the lands in question otherwise than as dowress, for partition or sale of the said lands, viz.: Lot 19 in the 10th con. of the township of Osgoode, in the county of Carleton.

The parties served with the notice and made defendants were Peter Joseph Kearns, James Francis Kearns, and Thomas Dominick Kearns, the last named being an infant; and all being the children of the late James Kearns, in his life time the owner of the lands in question, which he devised as follows: three-fourths of the land, definitely described and distinct from the rest, to Peter Joseph Kearns and James Francis Kearns as joint tenants, and the remaining one-fourth to the infant Thomas Dominick Kearns, all subject to the dower of the plaintiff, the widow of the deceased.

All three defendants opposed a partition or sale of the lands.

It appeared from the affidavits filed that the plaintiff had previously brought an action under the Dower Act, and that judgment for assignment of dower had been pronounced, though not yet issued.

Langton, for the adult defendants. It will be useless to make an order for partition of the lands. The two adult defendants do not desire a partition as between themselves ; the infant's fourth is quite distinct, and the adults are not interested in it ; the plaintiff has already a judgment for assignment of her dower, and that is all she can get under a partition order. What is really sought here is probably a sale ; but the affidavits shew that is not for the benefit of all parties. A dowress is not entitled to have partition of the lands : *Rody v. Rody*, 1 C. L. T. 146 ; *Freeman on Partition*, sec. 456 ; *Wood v. Clute*, 1 Sandford (N. Y.) 199 at p. 201. Here there are three sets of persons in some sense entitled to partition : (1) The widow who is entitled to have a portion set aside out of the whole lot ; (2) The adult defendants, one of whom is entitled to partition against the other ; (3) The infant ; and none of the three is entitled to partition against the other two. *Lalor v. Lalor*, 9 P. R. 455, shews that a tenant for life can apply for partition, and *Murcar v. Bolton*, 5 O. R. 164 that a tenant for life cannot be compelled to suffer partition ; the right, therefore, is not reciprocal. Where only one party desires a partition his share only may be assigned : *Hobson v. Sherwood*, 4 Beav. 184. If the plaintiff should be found entitled to partition, the result would be that she would only have her share assigned to her, and that she has already taken means to obtain. This proceeding is not under the Partition Act at all, but under the general orders of the Court of Chancery, and the provisions of the Act do not apply. R. S. O. ch. 40, sec. 52, shews the scope of the jurisdiction of the Court of Chancery. Even if the plaintiff is entitled to a sale, the Court has power to refuse her one as a matter of discretion, and that discretion may be well exercised where, as here, the other parties interested do not desire a sale. Dower is not an estate for life, it is not an estate at all : *Laidlaw v. Jackes*, 27 Gr. 101, 116. The plaintiff is bound to proceed for dower in the way she has begun : R. S. O. ch. 55, sec. 6. The plaintiff not having issued the judgment pronounced

in her favour, the defendants may either issue it for her and proceed upon it to have dower assigned, or they can have her action dismissed and her right to dower denied. The plaintiff is not entitled to proceed in a new way for the relief already granted: *Broom's Legal Maxims*, 6th ed., 318, 324; *Herman on Estoppel*, 124, 126, 127.

W. Creelman for the plaintiff. It is not to be considered on this motion whether a sale will be beneficial or not; that is a matter for the Master upon the reference: See form 172, O. J. A. The plaintiff is not obliged to follow out her other remedy to obtain assignment of dower. The plaintiff is entitled to partition: R. S. O. ch. 101, secs. 4, 8; 20 Vic. ch. 65; 32 Vic. ch. 32 (O.); *Laidlaw v. Jackes*, 27 Gr. at p. 116; *Murcar v. Bolton*, 5 O. R. 164, at p. 174; *Lalor v. Lalor*, 9 P. R. 455. What the plaintiff really desires is a sale, and the question is, whether the statute gives her a right to force a sale.

J. Hoskin, Q. C., for the infant, referred to *Agar v. Fairfax*, 2 White & Tudor L. C. 6th ed., 451.

FERGUSON, J.—This is an application for an order for partition of lands made on behalf of a tenant in dower, who is admitted to be entitled to dower out of the whole of the lands in question. It is admitted that she brought an action for her dower out of the lands, and that judgment in that action was given in her favor, but that nothing further was done in the action. Several of the defendants opposing this motion are devisees of three-fourths of the land, and the infant defendant also opposing the motion is devisee of the other one-fourth of the land. There is no connection between the rights or titles of the devisees of the three-fourths and those of the infant devisee of the one-fourth, except that the devisees of the three-fourths have the right, or a certain right, to cut timber on the one-fourth until the infant devisee attains full age. There are infants who have an estate upon a contingency in the one-fourth, but it is conceded that they are sufficiently represented by the infant who is before the Court.

All the devisees unite in saying that they do not want either a partition or sale of the lands at all, and they, one and all, strenuously oppose this application, which is admitted to be made for the purpose of obtaining a sale of the land. As between the devisees of the three-fourths and the infant devisee of the one-fourth of the land there could not be a partition; because by the devise the partition is already made, the one-fourth being a parcel of land by itself, and the three-fourths being also a parcel by itself. The dowress, the applicant, is however entitled to her dower out of the whole. Apart from her claim to a partition there could be no partition except amongst those entitled to the three-fourths, and they, as before stated, resist partition, saying that they do not want it at all, and so also does the infant.

It was contended that under the provisions of the eighth section of R. S. O. ch. 101, the dowress, being a "party interested in the land," has the right to file a petition for partition of the land, and so has the right to sustain this application. It was contended that on account of the infant's one-fourth and the other three-fourths being separate parcels, she (the applicant) would require one partition as against the infant and another as against the devisees of the three-fourths. Against the application it was contended that although under the provisions of the 4th section of the Act a dowress may be compelled to make or suffer partition or sale, yet that she cannot, under the provisions of the 8th section or any other existing law, bring and maintain a suit or proceeding for such partition or sale. For and against this contention counsel referred to the cases *Laidlaw v. Jackes*, 27 Gr. 101; *Murcar v. Bolton*, 5 O. R. 164, 174; *Lalor v. Lalor*, 9 P. R. 455; *Rody v. Rody*, 1 C. L. T. 546; *Freeman on Partition*, sec. 456; *Wood v. Clute*, 1 Sanf. Ch. 199, 201.

It was also contended against the applicant on the authority of *Hobson v. Sherwood*, 4 Beav. 184, that where one only of several is desirous of partition a part may be allotted to him or her, and the remainder held jointly, or

in common, as before, by the others, and that being so, what the applicant, if entitled to maintain the proceeding at all, would be entitled to would be to have her dower set apart, leaving the others to hold as before, and further that this is precisely what she already has judgment in another proceeding for, and that she cannot have judgment for it again (referring to *Herman* on Estoppel, pp. 126 and 127, and other authorities.) Mr. Langton also referred to R. S. O. ch. 40, secs. 52 and 53.

In the case *Murcar v. Bolton* the statutes passed from time to time on the subject of partition were considered and discussed at very considerable length by the learned Judges, who took different views regarding the matter there in question. The lands in the present case were devised by a testator. In that case (*Murcar v. Bolton*) the lands did not come from either a testator or an intestate, but had been granted by the Crown to a woman for life, with remainder to her four children in fee as tenants in common. There the question was with regard to the sale of a life estate in partition proceedings at the instance of those in remainder. I do not see that that the decision in that case aids one in arriving at a proper conclusion in the present case, although the discussion of the various statutes by so able Judges is very instructive.

In the case *Laidlaw v. Jackes*, 27 Gr. at p. 116, Mr. Justice Proudfoot is reported to have said that the widow in that case entitled to dower might have filed a bill for partition, referring to sec. 49 of the Act. It was contended, however, on the argument, that this was a dictum only. In *Lalor v. Lalor* the same learned Judge said: "Whether a dowress be entitled as such to apply for either a partition or sale need not be disposed of, because in her character as tenant for life (which she was in that case) she was entitled to one or the other."

In the case *Rody v. Rody*, the learned Judge of the county of Bruce decided that a dowress entitled to dower, not assigned, was not entitled to maintain proceedings for a partition of the lands out of which she was entitled to dower.

The statute under which the American case *Wood v. Clute* was decided differs from our Act so materially that the case is not a proper guide. The same may be said of the statement in the 456th section of *Freeman* on Partition. *Wood v. Clute* is one of the cases there referred to. I think the question as to whether or not a person entitled to dower (not assigned) can maintain proceedings for partition of the lands out of which she is entitled to the dower depends so much, if not so entirely, upon the provisions of the Partition Act, that the cases and authorities prior to the passing of the statute have little, if any, bearing on the subject. By the provisions of the fourth section of the Act a person in this position is certainly compellable to make and suffer partition or sale of the lands. From this it appears that the Legislature considered such partition possible, that is that the dower might be partitioned off. The eighth section provides that any party interested in any land in this Province, or the duly authorized agent of any such party, or the guardian (duly appointed by the surrogate) of any infant entitled to the immediate possession of any estate therein, may file a petition praying that partition of such lands may be made.

The case *Allen v. Edinburgh Life Assurance Co.*, 25 Gr. 306, decided by Mr. Justice Proudfoot and referred to with approval in *Douglas v. Hutchison*, 12 A. R. at p. 116, shews that such a right to dower is such an interest in lands as may be sold under a writ of *fieri facias* at law, and I do not see how it can be properly said that a person so entitled to dower is not a person interested in the land within the fair and obvious meaning of the language employed by the Legislature in the early part of the eighth section of the Act, and although I feel that I should speak with delicacy on the subject, especially after a perusal of the judgment of the learned Judge in the case *Rody v. Rody*, I cannot avoid arriving at the conclusion on the general question that a person entitled to dower out of lands, though the same is not assigned, is entitled to main-

tain proceedings for a partition of the lands out of which she is so entitled to the dower, and in arriving at this conclusion I have not overlooked the provisions of section 32 of the Act, nor those of ch. 40, secs. 52 and 53, R. S. O., to which I was referred.

The case of *Hobson v. Sherwood*, 4 Beav. 184, referred to in *Watson's Compendium*, however, decided that where one only of several is desirous of a partition, part may be allotted to him, or her, and the remainder held jointly or in common by the others, as before. In the present case all parties interested except the applicant strenuously resist the partition asked for. What, as against the others, the applicant would be entitled to as a matter of partition would be the setting apart of her dower. Such a partition would also be subject to whatever difficulty might arise by reason of the matter raised by Mr. Langton respecting the infant being as to the others, excepting the applicant, entitled in severalty. The applicant who asks for partition, already has the judgment of another Division of the Court for her dower out of these lands. This is all that in any view of the case she could obtain on this application, and [this is, as her counsel says, what and all that she asks for, although she desires to force a sale of the whole lands upon the others, who do not want either a partition or a sale. It was contended that by reason of that judgment the applicant is estopped from suing again for the same cause, and reference was made to *Herman* on Estoppel, pp. 126 and 127, amongst other authorities. The reply to this was that she had not issued or entered up the judgment. If this had been done I should have been of opinion in favor of the estoppel contended for. As the matter is, I cannot but think that this former suit, pending for substantially the same cause, operates as a bar to the further maintenance of these proceedings.

When the application is considered upon its actual merits, the respondents are, I think, in a position similar to that occupied by a defendant who, under the former practice, had pleaded in abatement the pendency of a former action

for the same cause and proved his plea, whose right would be to have the writ and declaration quashed. There being now, however, no plea in abatement allowed, the practice would be different, but the principle on which the right rested must be given effect to in some way, and I think the way to do this in the present instance is to dismiss the application; and, as I am of the opinion that the proceedings on the part of the applicant have been vexatious, the dismissal is with costs.

It seems to me unnecessary to decide the question raised as to the infant holding his one-fourth of the land in severalty, and apart from the other respondents to the application.

Application dismissed, with costs.

RIDDELL V. MCKAY.

Costs, security for—Reducing amount—Rules 429, 431, O. J. A.

An order amending a *præcipe* order for security for costs, issued under Rule 431, O. J. A., by reducing the security to \$200, cash paid into Court, was reversed, where no reason was shewn for making the reduction.

Held, that Rule 429, O. J. A., does not authorize the reduction of the sum named in Rule 431, O. J. A.

[November 1, 1886.—*Ferguson, J.*]

THIS was an action for the price of goods sold. The plaintiff lived in Scotland, and his place of residence being indorsed on the writ of summons, the defendant, pursuant to Rule, 431 O. J. A., issued the usual *præcipe* order for security for costs in the sum of \$400. On the application of the plaintiff the Local Master at Stratford made an order amending the *præcipe* order by reducing the amount of security to \$200, in the shape of cash to be paid into Court instead of a bond, the plaintiff desiring to give the

security in that form, with leave to the defendant to move thereafter to increase the security. The order also extended the time for furnishing the security. No affidavit was filed by the plaintiff shewing that the defendant's costs of the action would be less than the sum of \$400 named in the original order.

The defendant now appealed from the second order.

Aylesworth, for the appeal. The fact that the security is to be given in cash makes no difference; a bond to the satisfaction of the Court and the defendant is as good as cash paid into Court. No reason is shewn for reducing the amount of security, even if there is any power to reduce it, which is doubtful: *North v. Fisher*, 10 P. R. 582; *Bank of Nova Scotia v. La Roche*, 9 P. R. 903.

W. H. P. Clement, for the plaintiff. The money in Court is better security than a bond; a bond regarded when filed as perfect security may become worthless by reason of financial losses of the sureties. A custom has grown up for the Master to reduce the security in most cases to \$200, with leave to move to increase it afterwards, if shewn to be necessary.

FERGUSON, J.—I am of the opinion that the order, so far as it is an order reducing the sum from \$400 to \$200 cannot be sustained. There does not appear to be any reason shewn for doing this. The Rule 431 gives a positive right to the defendant to have the security for \$400, and I do not think that the provisions of Rule 429 so apply as to authorize the reduction of this sum. The appeal must be allowed to this extent. Costs to defendant in any event of the suit.

NEWCOMBE V. McLUHAN.

Order after action dismissed—Statement of claim—Extending time—Master in Chambers, jurisdiction of—Rule 462, O. J. A.

An order of the 4th October, 1886, extended the time for the delivery of statement of claim till the 12th October, but provided if it was not so delivered, the action should stand dismissed, with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action. *Held*, that notwithstanding the dismissal of the action, an order could properly be made under Rule 462 vacating the judgment, and further extending the time for delivering the statement, and the Master in Chambers had jurisdiction to make such an order.

[November 5, 1886.—*Wilson*, C.J.]

APPEAL from the order of the Master in Chambers of the 25th October, 1886, vacating the judgment for the defendant and extending the time for the plaintiff to deliver his statement of claim; and motion that an order be made dismissing the action with costs.

The plaintiff, in his affidavit, stated that the defendant, he believed, kept the negotiations open for a settlement to enable him to move to dismiss the action. This the defendant denied and said he believed that the plaintiff did not intend to try the action, but brought it to try to force some settlement from him.

The Master in Chambers, on the 4th of October, 1886, made an order discharging the defendant's motion to have the action dismissed with costs for the delay of the plaintiff in delivering the statement of claim, and giving the plaintiff until the 12th of October to deliver such statement, and directing that if the same were not delivered the action should stand dismissed with costs. The plaintiff served a statement of claim on the Toronto agents of the defendant's solicitor after four p.m. on the 12th October, and sent a copy of the same to Guelph, the proper office for filing, the same day, to be filed, but it was not filed till the 13th of the month.

The defendant's solicitor signed judgment against the plaintiff dismissing the action.

The plaintiff moved to have the judgment set aside and the time extended for delivering the statement of claim. The Master, on the 25th October, set aside the said judgment and extended the time for the delivery of a statement of claim by the plaintiff.

The defendant now appealed against that order.

H. Symons, for defendant, argued that the Master had no power when this action was dismissed to make any order, for there was no action pending between the parties, and he referred to Rules 150, 459, O. J. A: *Whistler v. Hancock*, 3 Q. B. D. 83; *Wallis v. Hepburn*, 3 Q. B. D. 84, note; *King v. Davenport*, 4 Q. B. D. 402.

J. B. Clarke, shewed cause. He referred to *Carter v. Stubbs*, 6 Q. B. D. 116; Rule 462, O. J. A.

WILSON, C. J.—Rule 462 gives power to the Court or judge to enlarge or abridge the time for doing any act or taking any proceeding upon such terms as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

The Court in *Whistler v. Hancock*, 3 Q. B. D. 83; *Wallis v. Hepburn*, 3 Q. B. D. 84, note; *King v. Davenport*, 4 Q. B. D. 402, decided that after the action was dismissed the Master could make no order between the parties. The later cases of *Burke v. Rooney*, 4 C. P. D. 226, and *Carter v. Stubbs*, 6 Q. B. D. 116, are to the contrary.

The rule 462 says the Court or a Judge may enlarge the time, and in 6 Q. B. D. 116, it appears the order of the Master extending the time was rescinded by the Common Pleas Division, but the orders of Hawkins, J., were affirmed, which extended the time for appealing against the order of the Master, and which extended the time for doing the act by the plaintiff, on failure of which the action was to be dismissed. The Master in Chambers, in this country, has the power of a Judge in Chambers, and he had the power therefore to make the order complained of. If the

benefit of that order were to fail, I should be inclined to treat this as a motion by the plaintiff, if possible, to set aside the judgment and to extend the time for filing his statement of claim under the circumstances, or I should allow him to give a notice of motion for that purpose to be disposed of by a Judge in Chambers.

I think, however, I can dispose of the case as it is, because the Master having the jurisdiction of a Judge in Chambers in such a case, the powers he exercised are supported by the latter decisions referred to. It was an every day's practice for a Judge in Chambers before the Judicature Act to set aside and give relief against judgments, and the jurisdiction of the Courts or Judges is assuredly not restricted by that Act.

I dismiss the motion, with costs.

RE PACQUETTE.

County Judge, jurisdiction of—Prohibition—48 Vic. ch. 26 sec. 6 (O.)—Persona designata.

A Judge of a County Court, acting under the authority of 48 Vic. ch. 26 sec. 6 (O.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the Judge made an order for the issue of a writ of attachment against the first assignee for contempt.

Held, that the Judge, in acting under the statute, was not exercising the powers of the County Court, but an independent statutory jurisdiction as *persona designata*, and had therefore no power to direct the issue of a writ of attachment; and prohibition was ordered.

[November 5, 1886.—*Wilson*, C. J.]

MOTION on behalf of William Finlay, the assignee in trust, for the benefit of the creditors of one Pacquette, an insolvent, appointed herein in lieu of the sheriff, for an order for the issue of a writ of prohibition directed to Robert Lyon, Junior Judge of the County Court of the county of Carleton,

and to Peter Larmouth of the city of Ottawa, accountant, prohibiting them and each of them from further proceeding upon a certain order made by the said Judge in Chambers, on the 8th of October last, giving leave to the said Peter Larmouth to issue a writ of attachment against the said William Finlay for contempt alleged in the said order, and from taking any further proceedings in any way to enforce the said order of the Judge, upon the ground that the said Judge had no jurisdiction to hear and determine the application of the said Larmouth for the order aforesaid, or to make any such order, and upon grounds disclosed in the affidavits and papers filed, and for an order for payment by the said Peter Larmouth to the said William Finlay, of his costs of the application.

The affidavits and papers filed shewed the facts. Peter Larmouth said that by an order made herein by Robert Lyon, Esquire, Junior Judge of the said County Court, on the 25th of October, 1886, William Finlay (who at a meeting of the creditors of the said insolvent held on the 22nd of September, 1886, was appointed the assignee of the estate and effects of the said insolvent) was removed from his said office as assignee and the deponent was by the said order substituted in his place as such assignee.

Edward Plunkett, law clerk, said that he personally served, on the 6th of October instant, William Finlay with a true copy of the order made in the said matter, by delivering to and leaving the same^r with him, at his place of business in Ottawa.

The same deponent in another affidavit said: that the service made upon William Finlay, in his former affidavit mentioned, was made by him for and on behalf of Peter Larmouth, the assignee of the estate and effects appointed in substitution for the said William Finlay. At the time he served the said copy of order^r upon the said Finlay, he, the deponent, on behalf of the said Larmouth and by his authority and direction, demanded of the said Finlay the keys of the premises in which the business of the said Henry Pacquette was carried on, but he refused to deliver

up the same and stated to the deponent that he would retain and keep them until some further order was made against him for that purpose.

Notice of motion was served upon William Finlay that Peter Larmouth be at liberty to issue a writ of attachment against him for the contempt of the said Finlay in not delivering up to Larmouth the keys of the premises in which the business of Henry Pacquette was carried on, and which by an order of Robert Lyon, Junior Judge of the County Court of the county of Carleton, bearing date the 2nd of October, 1886, the said Finlay was ordered and directed forthwith to do; and that the said Finlay should be ordered to pay to the said Larmouth the costs of and occasioned by this application, and of and incidental to the issuing and execution of the writ of attachment, and for such further and other order as to the said Judge might seem meet.

The order of the said Judge of the 8th of October, was then made, that Peter Larmouth, the assignee of the estate and effects of the said Henry Pacquette, be at liberty to issue a writ of attachment against William Finlay for his contempt in not delivering up to the said Larmouth the keys of the premises in which the business of the said Pacquette was carried on, and which by an order of Robert Lyon, Esq., Judge of the Court, dated the 2nd of October, 1886, the said Finlay was ordered and directed forthwith to do; and upon reading the affidavit of the said Larmouth, and two affidavits of Edward Plunkett, respectively filed on the 7th of October, and the said order of the 2nd of October, and upon hearing Mr. Barry of counsel for the said Finlay, "I do order that the said Peter Larmouth be at liberty to issue a writ of attachment against the said Willam Finlay for his contempt in refusing to comply and not complying with the said order of the 2nd of October, 1886, made by me on aforesaid date. And I order that the costs of and occasioned by the application and the said attachment

be paid by the said Willam Finlay to the said Peter Larmouth.

Dated in Chambers this 8th day of October, 1886.

(Signed) ROBERT LYON.

J. J. C. C. C. C."

Mr. Barry, the solicitor for William Finlay, said that he moved in the Queen's Bench Division against the order of the 2nd of October. Before the return of the said notice of motion William Finlay was served with a notice of motion that an attachment was to be applied for against him. On attending before the Judge of the County Court on the return of the notice of motion, he moved for an adjournment of the motion, as he had moved in the Queen's Bench Division against the jurisdiction of the Judge to grant an attachment against William Finlay. A writ of attachment was, however, ordered to issue for contempt of the said order of the 2nd of October, and a warrant was issued thereon.

It was sworn in answer that Mr. Barry did not object to the Judge's jurisdiction when he made the order for an attachment to issue. And an affidavit was also filed that before the writ of attachment was issued, the order of the 2nd of October was filed in the office of the clerk of the County Court, and that there was not kept in the said office an official book for the entry of orders or copies thereof.

Aylesworth, supported the motion, and cited: 48 Vic. ch. 26, sec. 4, (O.); *Re Allen*, 31 U. C. R. 458-493; *The Queen v. Lefroy*, L. R. 8 Q. B. 134; same case reported as *Ex parte Jolliffe*, 42 L. J. Q. B. 121; *Re Tyrone Election Petition*, *Macartney v. Corry*, 7 Ir. R. C. L. 242.

Shepley shewed cause, and referred to *Re Waldie and Burlington*, 13 A. R. 104, and 48 Vic. ch. 26, secs. 6, 7, 8, 10, 11, 13, sub-sec. 3, secs. 14, 18, sub-sec. 3, (O).

WILSON, C. J.—The question is, whether the Deputy Judge of the County Court had jurisdiction to make the

order for the issuing of the writ of attachment against Mr. Finlay, for refusing to deliver the keys of the premises in which Mr. Pacquette had carried on business, pursuant to the order of the Deputy Judge of the 2nd of October, 1886; that is, firstly, whether the order of the 2nd of October was made in a *judicial proceeding*; and if it were, then secondly, whether the order of the Deputy Judge which professed to have been made in Chambers should not have been made a rule of Court before a motion could be made for a writ of attachment to issue against Mr. Finlay for his alleged contempt.

There are some irregularities of practice in these proceedings which may be pointed out, although they cannot be made an objection here. For the question before me is one of jurisdiction only.

At the time of the service of a copy of the order of the 2nd of October, Mr. Plunkett, who served it, should have had a power of attorney from Mr. Larmouth empowering him to make a demand upon Mr. Finlay for the keys, and Mr. Finlay should have been served with a copy of that power of attorney.

The original order of the 2nd October and the original letter of attorney also, I think, should have been shewn to Mr. Finlay at the time of the demand made. The demand should have been upon Mr. Finlay to deliver up the keys after the order of the 2nd of October had been made a rule of Court, that is, the contempt should be shewn to have been to the order of the Court and not to the order of the Judge, assuming of course for this purpose that these were proceedings of a judicial nature. For it is not every act which requires judgment that is a judicial act, but such as is done *pendente lite*, of some sort or other: Com. Dig. "Leet" M. 5.

It is possible if no demand was made by an authorized person, and the want of a power of attorney where one was required by the person making the demand would make him an unauthorized person, and it is possible also the want of a demand altogether, excepting upon the order of the

Judge of the 2nd of October, would be grounds for discharging him upon a *habeas corpus*, or for the removal of the proceedings by *certiorari*, although these are not objections upon a motion for a prohibition : *Combe v. Edwards*, 3 P. D. at p. 128, *et seq.*

The matter which I have to dispose of, I must now consider.

The Act in question is the 48 Vic. ch. 26 (O.) The preamble is: "Whereas great difficulty is experienced in determining cases arising under the present law relating to the transfer of property by persons in insolvent circumstances, or on the eve of insolvency, and it is desirable to remedy the same."

A Judge of the High Court or of the County Court of the County in which &c., may remove the creditors' assignee and appoint another in his stead, or may appoint an additional assignee. Sec. 6.

The Judge may also authorize a creditor to sue in the trustee's name in certain cases and upon such terms as the Judge shall prescribe. Sec. 7, sub-sec. 2.

The Judge may cure defects in assignments. Sec. 10.

The County Court, or a Judge thereof, may fix the assignee's remuneration, if not fixed by the creditors. Sec. 11.

The penalties for non-publication of a notice of the assignment may be recovered summarily before the Judge. Sec. 13, sub-sec. 3.

And the Judge may order the publication to be made Sec. 14.

In every provision of the Act where any act is to be done by a Judge, it is always directed to be done by a Judge of the High Court or of the County Court, in which, &c., excepting in section 11, and under that section it is the County Court in which, &c., or the Judge thereof who is to review the remuneration of the assignee if the creditors or the inspectors fail to fix it.

It appears the subject of the statute is not of a contentious or litigious nature.

The property of the insolvent is not by the statute taken from him. The assignment is a voluntary proceeding upon his part. He can by his own act assign only to the sheriff. With the assent of his creditors he may assign to some person other than the sheriff; and the creditors of their own motion may substitute another person as assignee in place of the sheriff. The debtor is restricted only in his choice of an assignee.

Then as to the Judge:

1. He may substitute an assignee for the creditors' assignee, or appoint an additional assignee.

2. He may empower a creditor in certain cases and upon certain terms, to sue in the assignee's name.

3. He may amend defects in the assignment.

4. Penalties for non-publication of the assignment may be summarily sued for before him; and

5. He may order the publication to be made.

Besides these powers,

6. The County Court or the Judge of the County Court in which, &c., may review the claim of the assignee for remuneration, if the creditors or inspectors do not fix it.

The first, second, third, and fifth of these matters are not judicial proceedings, or in the nature of judicial proceedings. The Court is not to act at all, but the Judge alone.

The fourth matter, the recovery of penalties, is not given to the Court but to the Judge personally. The proceedings would not be instituted in the High Court of Justice, or in the County Court. They would not be filed in either of these Courts. Nor would the process of these Courts be used to bring the assignee before the Judge. Nor would his decision or order be a judgment of the Court. Nor would execution issue from the Court. It is to be a summary proceeding, which might as well have been directed to be carried on before a Justice of the Peace. The whole proceeding before the Judge is in the nature of a prosecution, upon which an order or conviction is to be made by the Judge, which could be removed

by *certiorari* as an ordinary order or conviction. It is certainly a judicial proceeding, but it is one of a special and exceptional nature, with which the Court has nothing to do, and in which the Judge plainly is not the deputy or substitute of or for the Court, but one who is *persona designata*.

Then as to the 6th ground above stated, that is the *County Court* or a *Judge* thereof is to fix the assignee's remuneration if the creditors or inspectors fail to do so; the Judge in that case would I think be the deputy of the Court, and his act would be as if the act of the Court. But that matter is not now in question.

The case of *Re Allen*, 31 U. C. R. 458, refers to many cases in which a Judge of the Court can only act, and the Court has not power review his decision.

There are some other cases which may be referred to.

The Tyrone Election Petition, *Macartney v. Corry*, 7 Ir. R. C. L. 242 (1873), was a motion to commit for publication of articles in newspapers calculated to interfere with a fair trial of the petition. Held that the petition is a proceeding pending in the Court, and it is not until the trial commences before the election Judge that the full jurisdiction of the Court comes into operation. Until the trial the Judge would act not as an independent Court, but in aid of the Court of Common Pleas, and therefore the motion to the Judge to commit for contempt before the trial was a contempt of the Court of Common Pleas, in which Court the motion should have been made.

In *Stuart v. Bute*, 9 H. L. C. 440, it was held that the Lord Chancellor, though "Chancellor of Great Britain," has only certain statutory powers in Scotland, which are not of a judicial nature.

In *Shortridge v. Young*, 12 M. & W. 5, it was held that where a Judge in Chambers disposes of a case summarily in an interpleader by consent of parties, the Court has no power to review his decision. Such consent constitutes the Judge an arbitrator for the occasion.

In *Dodds v. Shepherd*, 1 Ex. D. 75, it was held that the decision of a Judge in Chambers who disposes of the merits of an interpleader in a summary manner under the C. L. P. Act, 1860, sec. 14, is final, and he cannot even by consent of parties give the right to appeal to the Court.

In *Wearing v. Smith*, 9 Q. B. 1024, the Court refused to discharge defendant, a bankrupt, from custody under a judgment obtained against him before the confirmation of his certificate, the jurisdiction being given to a single Judge.

In a like case, *Clark v. Smith*, 3 C. B. 982, it was said the Court had no original jurisdiction in such a case.

The Imperial Act 8 Vic. ch. 18, sec. 52, gave power to the masters of the Court of Queen's Bench to settle the costs in proceedings under that Act. Held that the Court had no jurisdiction in the matter, as the power was given to the masters, not as officers of the Court, but as *personæ designatæ*: *Owen v. London and North-Western R. W. Co.*, L. R. 3 Q. B. 54; See also *Re The Sheffield Waterworks Act*, 1864, L. R. 1 Ex. 54.

I am of opinion the Junior Judge was not exercising the powers of the Court, but an independent statutory authority conferred upon him, and in a matter which was not to be adjudicated upon in Court, or in any matter which required to be transacted in Court. He was *persona designata*, and from him there could be no appeal to the County Court, nor in such matters as he had to decide upon, to the Court of Appeal. The review of his acts would be by *certiorari*. See L. R. 3 Q. B. p. 59, as to the remedy suggested by Cockburn, C. J.

The case of *Re Waldie and Burlington*, 13 A. R. 104, is different from the one before me, for in the former case the power was given to the Superior Courts, or to any Judge thereof, or to the Judge of the County Court, and in that case the Judge of the Superior Court when acting was acting as the deputy of the Court. But that is not the case here.

I may also refer to the case of *The Queen v. Lefroy*, L. R. 8 Q. B. 134, in which it is laid down that an inferior

Court cannot at the common law, nor unless by express legislative enactment, commit for any contempt except for a contempt committed in the face of the Court.

But in this case the writ of attachment was not granted by the County Court, but by the Judge of the Court as for a contempt of his order.

In no way of considering the case can the writ of attachment be sustained. I must, therefore, make the motion absolute, and with costs to be paid by Mr. Larmouth; the costs on this motion to be set off against the costs of the motion before Mr. Justice Galt, which were ordered to be paid to Mr. Larmouth.

SEYMOUR V. DEMARSH.

Local venue—Foreclosure—Possession—Ejectment—Rule, 254, O. J. A.

An action by a mortgagee for foreclosure, payment, and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254, O. J. A., and the venue need not therefore in such an action be laid in the county where the lands lie.

[November 10, 1886.—*The Master in Chambers.*]

AN action by a mortgagee for foreclosure, payment, and immediate possession of the mortgaged premises.

The lands were in the county of Hastings. The plaintiff, in his statement of claim, proposed Cobourg (in the county of Northumberland) as the place of trial.

Hoyles, for the defendant, moved to set aside the statement of claim on the ground that the action was one of ejectment and the venue, by Rule 254, O. J. A., should have been local.

H. J. Scott, Q.C., for plaintiff, contra.

The MASTER IN CHAMBERS.—The question on this motion is, whether a foreclosure suit, where immediate possession is demanded, is an action of ejectment within Rule 254, or subject to the provision as to an action of ejectment, and, therefore, whether the venue in such a mortgage suit is local.

Looking a little behind that rule, the foreclosure suit has come down from the Chancery practice, and in that practice there never was any fixed locality of venue applying to certain actions, as in the common law practice, and before the Judicature Act, or the Administration of Justice Act, the plaintiff by a proceeding in the foreclosure suit, after a final judgment in foreclosure, could by process of law enforce the delivery of possession to him by the defendant. That was *after* the final foreclosure, and it must be observed as to it, that it was not the object of the suit to enforce that remedy; the object of the suit was to bar the defendant's right of redemption; and the delivery of possession was enforced after judgment for the plaintiff on the matters really in litigation in the suit, where the decision shewed that the plaintiff was entitled to the possession. It was given to him as a right necessarily incident to his recovery in the matter which was really in contest in the suit.

Since the Administration of Justice Act there has been the power to award execution by *hab. fac. pos.* while the foreclosure suit is yet open and pending, that is, upon the plaintiff obtaining the preliminary judgment, as upon default of appearance for instance. That practice is continued by the Judicature Act, and the difference, and the only difference that need be mentioned, is that now the plaintiff is entitled to the writ of possession upon obtaining the preliminary judgment in the suit, whereas under the old Chancery practice the plaintiff was entitled to possession upon the final foreclosure only.

The alteration, it will therefore be perceived, relates only to the time and the occasion at and on which the possession of the premises could be enforced by the plaintiff. It

was no new power conferred upon the Court by the Administration of Justice Act or the Judicature Act.

These considerations and the fact that the word "ejectment" is shunned throughout the rules, and nowhere, that I know of, appears in them, except in Rule 254, by which rule a local venue is exceptionally given to "an action of ejectment," bear very strongly towards this, that the words are used in that rule in a technical sense, for these words "*action of ejectment*" convey a distinct idea of what is meant. They not only describe the object of the suit, to gain the possession of land, but they also intimate the nature of the proceeding by which that object is sought, viz., the old common law action of that name, or rather what now stands in the very place of it. That is what these words *primâ facie* convey to a lawyer.

The sense in which these words are to be taken, and whether a mortgage suit where the same remedy of possession is obtained as is obtained in ejectment, though by a different proceeding, can be brought within the words, has much to do with the question here.

The considerations are not all one way. Rule 116 is in these words: "No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are or is held; and except claims in actions on mortgages, for the recovery of the mortgage money and for foreclosure or sale."

It has been pointed out to me that while by this Rule 116, which relates to actions "for recovery of land," mortgage suits are excepted, yet there is no like exception of mortgage suits from Rule 254, relating to local venue. That is true, but it may be answered that, though ejectment is a suit for the recovery of land, that is for the recovery of the possession of land, yet there are other suits for the recovery of land than ejectment, and although it is the fashion now to call the action of ejectment an action for

the recovery of land, yet the two expressions, "action of ejectment" and "action for the recovery of land" are not equivalents. The words in Rule 116 may mean an action of ejectment, but they are not necessarily confined to that. I think they do *include* an action of ejectment.

However, I should like to have, and I think I have, some better reason than these verbal distinctions for entertaining the opinion I have come to.

I think there is no local venue in this mortgage suit; 1st, because there never was any local venue in such a suit before the Judicature Act, when the remedy was pretty much as it is now, and that the words of Rule 254 applying to "*an action of ejectment*" do not apply to this mortgage suit, but have a technical meaning, which must be observed for a reason I will state. Of course if not within these words, then the Rule 254 excludes local venue in this case. The action of ejectment can only be brought, according to the rules, for the lands in one county; a plaintiff may have the right to eject the same defendant from lands in several counties. If so, he can and must bring an ejectment in each county where the lands may lie. But if a plaintiff has a mortgage containing lands in several counties, securing one debt, a case common enough, he cannot bring several foreclosure suits. It is plain when you consider the rights of parties in a foreclosure, that there can practically be but one suit; the mortgagor must be entitled to redeem all the lands at once by one payment. There must be one trial, if a trial at all, and one account taken. Then, if there cannot be such a multiplication of proceedings, where must be the venue?

I think this practical reason makes it plain that the primary technical meaning of these words "action of ejectment" must be enforced, and it seems to me that it is probable that the draughtsman who drew Rule 254 had something of this in his mind when he used that expression, instead of the familiar and at present fashionable expression, "*action for the recovery of land*," which latter would most likely have included a mortgage suit.

I think that there is no local venue for this mortgage suit, and that this motion must be discharged with costs.

I should say that I remember, some years ago, holding that the venue in a dower suit was local, to which I was led by the consideration that the possession of the land assigned to the plaintiff was enforceable by *hab. fac. pos.* If I was right in that, it would not necessarily rule in the case of a mortgage suit. I do not know that it was ever reported. I suppose it was not, or it would have been cited now. Rule 502, amending Rule 78, seems to assume that there is no local venue in a mortgage suit.

REGINA V. MEYER.

Criminal law—Refusing to provide for wife and children—Defendant as witness—Magistrates' powers and duties—32-33 Vic. ch. 20, sec 25 (D.)—49 Vic. ch. 51, sec. 1 (D.)—"Prosecution," meaning of in latter Act.

Under 32-33 Vic. ch. 20, sec. 25 (D.), as amended by 49 Vic. ch. 51, sec. 1 (D.), defendant was charged by his wife, before a magistrate, with refusing to provide necessary clothing and lodging for herself and children. At the close of the case for the prosecution, defendant was tendered as a witness on his own behalf. The magistrate refused to hear his evidence, not because he was the defendant, but because he did not wish to hear evidence for the defence; and subsequently without further evidence committed him for trial.

Held, that the defendant's evidence should have been taken for the defence; that a magistrate is bound to accept such evidence in cases of this kind and give it such weight as he thinks proper, and that the exercise of his discretion to the contrary is open to review.

Held, also, that the amended section of the Act is intended to enlarge the powers and duties of magistrates in cases of this nature, and that the word "prosecution" therein includes the proceedings before magistrates as well as before a higher Court.

[October 29, 1886.—*Wilson, C.J.*]

THE defendant, Jacob Meyer, was charged on the information of his wife, Hannah Meyer, before John A. Mackie, J. P., of the town of Berlin, in the county of Waterloo, for that, being legally liable to provide his wife and children with necessary food, clothing, and lodging, he wilfully, and without lawful excuse, refused and neglected to provide the same. The information was laid under 32-33 Vic. ch. 20, sec. 25 (D.), as amended by 49 Vic. ch. 51, sec. 1 (D.). Sec. 25 enacts that: "Whosoever being legally liable, either as a husband, parent, etc., to provide for any person as wife, child, etc., necessary food, clothing, or lodging, wilfully and without lawful excuse, refuses or neglects to provide the same, etc., is guilty of a misdemeanor." The amending Act, sec. 1, adds to the above section the words following: "And in any prosecution of any person under this section for refusing or neglecting to provide necessary food, clothing, or lodging for his wife or child, his wife shall be competent to

give evidence as a witness either for or against her husband: (2) The person charged shall be a competent witness in his own behalf."

Defendant's wife was the only witness examined before the magistrate. Her evidence contained statements both for and against her husband, but as a whole is immaterial in so far as the principal question decided is concerned. At the close of the wife's evidence defendant's counsel called defendant as a witness in his own behalf, but the magistrate refused to hear him. The depositions had the following note by the magistrate on that point: "Mr. King here proffers the defendant, Jacob Meyer, as a witness. I refuse to hear his evidence, not because he is the defendant, but because I don't wish to hear any evidence for the defence. Mr. King submits that there is no case against the defendant on which there can be a committal."

The proceedings were then adjourned for a week for the magistrate to take the opinion of the County Attorney, and, thereafter, upon such opinion being given, the defendant was committed for trial.

A summons was subsequently obtained from Wilson, C. J., calling upon the clerk of the peace, the committing magistrate, and the gaoler of the county, to shew cause why a *habeas corpus* and *certiorari* should not be granted with a view to the prisoner being discharged, or why the case should not be referred back to the magistrate to take the evidence of the defendant, or why such other order should not be made as might seem just.

J. King moved the summons absolute. A *certiorari* is not required, as the original information, depositions, and other papers are here. But there should be an order for a *habeas corpus*, or at least for a reference of the case back to the magistrate. It must appear that the wife and children are in need; that the alleged neglect and refusal to support them are wilful, and that the defendant had present means to support them. The evi-

dence fails on these essential points: *Regina v. Nasmith*, 42 U. C. R. 242; and in any event the defendant should be let go on his own recognizances. The wife formerly could not be a witness against the husband in cases of this kind: *Regina v. Bissell*, 1 O. R. 514, where the authorities are collected and reviewed. 49 Vic. ch. 51, sec. 1 (*D.*), amending 32-33 Vic. ch. 20, sec. 25 (*D.*), is plainly intended to make both husband and wife witnesses, and this before a magistrate as well as before a higher Court. The word "prosecution," in the amending Act, should be taken in a wide, general sense, as including proceedings before a magistrate. Otherwise the amendment will be largely inoperative and work great injustice. The "prosecution" commences with the information before the magistrate: *The Queen v. Yates*, 11 Q. B. D. 750; *Yates v. The Queen*, 14 Q. B. D. 648 (C. A.); *Rex v. Willace*, 1 East's Pleas of the Crown, 186. The Legislature apparently intended to make this a *quasi* civil offence as in criminal libel, and there are obvious reasons in favour of such a view. The magistrate had no discretion as to hearing the defendant in his own behalf; he was bound to hear him. The amending Act says: "the person charged shall be a competent witness in his own behalf," *i. e.*, "in any prosecution" of such person. A legal duty is thereby imposed to accept the defendant as a witness, and, where such a duty exists, there is no discretion: *The Queen v. Boteler et al.*, 4 B. & S. 959; *Regina v. The Justices of Durham*, 19 L. T. N. S. 396. In England, witnesses for the accused may be examined before Justices: 30-31 Vic. ch. 35, sec. 3. See also *Oke's Magisterial Synopsis*, Vol. 1, p. 49. In cases of assault, simply, magistrates have no discretion, but must admit the defendant's evidence: 41 Vic. ch. 18 (*D.*)

E. F. B. Johnston, for the Attorney-General, commented on the wife's deposition, and contended there was sufficient evidence to warrant a committal. Magistrates, in the case of indictable offences, should only hear evidence for the prosecution. The present is such an offence, and

no exception is made of it by the amending Act or otherwise: See 32-33 Vic. ch. 30, secs. 25 and 56 (*D.*) The magistrate was right in declining to hear the defendant's evidence; that has always been the rule and practice; and these have not been varied or altered in cases of this nature by the Act as amended. At all events the magistrate exercised a discretion in refusing; this discretion was properly exercised; but whether it was or not, it can not be reviewed. It has been the practice of the Department to advise magistrates against hearing evidence for the defence, otherwise they would be trying and determining charges which should go before a higher tribunal. The effect of this would be most mischievous, and not in the interests of justice. The word "prosecution" in the amendment does not, it is submitted, enlarge the powers or duties of magistrates in this respect. It means only the prosecution before a higher Court. See *Re Phipps*, 8 A. R. 77, and remarks therein by Patterson, J. A., as to a person charged before a magistrate with an indictable offence calling witnesses.

WILSON, C. J.—In determining whether a *habeas corpus* should issue the main question, I suppose, is whether such a case is made out for the prosecution as would warrant a Judge in leaving it to a jury. There is some evidence here which, assuming it to be reliable, supports the charge against the defendant, and I cannot altogether discard it, and say that the defendant should be absolutely set at liberty. But the case must go back to the magistrate, if required, for the purpose of taking the defendant's evidence. I think the defendant should have been sworn, and his evidence taken, when he was tendered as a witness in his own behalf, and that the magistrate was not justified in refusing to hear him. In my view of the amended section of the Act referred to, the magistrate is bound to accept the testimony of the accused in a case of this kind, and to give it such weight as he thinks proper; and that any assumed discretion, which he may exercise to the

contrary, is properly open to review and correction by a Judge here. The prosecution of a person so charged, or in fact on any charge, commences with the sworn information, and I am of opinion that the word "prosecution" in the amendment must be held to include proceedings before the magistrate, as well as before a higher Court. The section of the Act as amended is evidently intended to enlarge the powers and duties of magistrates in cases of this nature, and, although I do not say they may or should undertake to try such cases, I think they are not at liberty to decline the duty of taking the defendant's evidence. It is in the interest of justice they should hear what the accused has to say on oath. To deny him such a hearing might often be the means of inflicting great hardship and injustice, especially if those in whose power he is for the time being are ignorant, prejudiced, or vindictive.

In the present case, for example, it is suggested by the wife's cross-examination that she was unfaithful to her husband. If she was it would be an answer to the charge, so far as she is concerned, as he would be no longer bound to support her. He might be in a position to prove her infidelity before the magistrate beyond any question. So he might also be fully prepared to shew that, at the time he left her, he gave her the most ample means of support for herself and children. Surely, as the Act stands, the magistrate would not be justified in refusing to accept such evidence. I presume, however, the main object of the present application is, to have the defendant released from custody. If the case be referred back, the magistrate might, notwithstanding the defendant's denial of the most material statements of the wife, re-commit him to gaol. I think an order for his release, on his own recognizances to appear and answer to the charge at the next Court of competent jurisdiction, will do substantial justice, and with the Attorney-General's consent, I will direct that the order should go in that way.

Order accordingly.

RE SMART INFANTS.

Habeas corpus—Return—Infant, custody of—R. S. O. ch. 130, sec. 1.

A return was made by the mother of the infants, in whose custody they were, to a writ of *habeas corpus* obtained by the father with the object of compelling the delivery of their custody to him. The return stated that they were all under twelve, the age mentioned in R. S. O. ch. 130, sec. 1.

Held, upon demurrer, that the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law.

Re Murdoch, 8 P. R. 132, explained and followed.

[November 8, 1886.—*Ferguson*, J.]

DEMURRER by David Smart, the father of certain infants to the return made by their mother, Emilie Ardelia Smart, to a writ of *habeas corpus* obtained by the father.

The facts and the return are set out in the judgment.

J. MacLennan, Q. C., and *H. J. Scott*, Q. C., for David Smart.

S. H. Blake, Q. C., and *H. Cassels*, for Emilie Ardelia Smart.

The following authorities were referred to: *Re Agar-Ellis*, 10 Ch. D. 49; 24 Ch. D. 326, 331, 332, 333; *Re Goldsworthy*, 2 Q. B. D. 75, 82, 84; *Re Besant*, 11 Ch. D. 508; *Besant v. Wood*, 12 Ch. D. 605; *Lush* on Husband and Wife, 409, 420; *Re Ferguson*, 8 P. R. 556; *Re Murdoch*, 9 P. R. 132; *Everhay* on Domestic Relations, 540, 480, 474, 470; R. S. O. ch. 130: *Eyre v. Countess of Shaftesbury*, 2 W. & T. L. C., 14th ed., 659, 660, 693; *Meredith v. Williams*, 27 Gr. 154; *Vardon v. Vardon*, 6 O. R. 719; O. J. A. sec. 17, sub-sec. 9; *Re Ethel Brown*, 13 Q. B. D. 614.

FERGUSON, J.—The infants are Mabel Beatrice Smart, Lillian Constance [Smart, and David Worts Smart, who are in the care and custody of their mother, Emilie Ardelia Smart, in the city of Toronto.

Their father, David Smart, has obtained the issue of a writ of *habeas corpus* with the object of compelling the delivery of the custody of the infant children to him. This writ has been duly served and a return thereto made by the said Emilie Ardelia Smart.

The question before me now is, as to whether or not this return is good and sufficient in law, a question that was argued at great length, and, as I thought, most ably by counsel.

The return is comparatively very long, and thinking, as I do, that a sufficient synopsis or summary of it cannot be conveniently given, I set it forth at length. I should, however, say here that the actual attendance of the infants in Court before me was by consent of counsel and with my approval and by my directions dispensed with, and that the matter and proceedings before me were, and are to be by consent, treated and considered as if the infants were in fact in Court before me.

The return to the writ is as follows:

“Emilie Ardelia Smart, to whom the annexed writ is directed, is now here before your Honor with the bodies of Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, therein named, as therein commanded.

“And I certify that the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, were born respectively on the 10th day of April, 1875, the 19th day of July, 1877, and the 13th day of October, 1880, and have throughout their lives lived with me and been under my care and custody.”

“And I further certify that the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, are the lawful issue of myself and my husband David Smart in the annexed writ mentioned; that the said David Smart and myself were married on the 4th day of June, 1874, and lived together as man and wife until the month of July, 1883, when I was compelled to leave him and live apart from him owing to the fact that he had become an habitual drunkard, and had become so

morose and ill-tempered that my health was broken down by the worry and anxiety of living with him, and that I was advised by my physicians that to save my life I should cease to live with him, and owing to the fact that his habits of intemperance rendered him incapable of having the care and custody of his said children, the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart; that afterwards, on the 2nd day of May, 1884, the said David Smart having determined to abandon his habits of intemperance, and to demean himself towards me and the said infants Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, as he should, entered into an agreement with me under seal, in the words following :

“ ‘ This indenture made the second day of May, one thousand eight hundred and eighty-four, between David Smart of the Town of Port Hope, Esquire, of the first part, and Emilie Ardelia Smart his wife, of the second part.

“ ‘ Whereas unhappy differences have arisen between the said David Smart and Emilie Ardelia Smart. And whereas the said David Smart and Emilie Ardelia Smart have been living separate and apart for some time on account of such unhappy differences. And whereas the said unhappy differences have arisen from the habits of intemperance of the said David Smart. And whereas the said David Smart has determined to abandon such habits, and in consideration of that, and for other causes and considerations in the instrument mentioned, the wife of the said David Smart has agreed to return and live with him the said David Smart.

“ ‘ Now this indenture witnesseth, that in pursuance and in and towards performance of the premises, and in consideration of the covenants hereinafter contained they, the said David Smart, and Emelia Ardelia Smart, do hereby covenant, promise, and agree to and with each other in manner following, that is to say :

“ ‘ 1. The said Emelia Ardelia Smart will out of her own estate advance the sum of eight thousand dollars (\$8,000) to pay the debts of the said David Smart.

“ 2. That the said Emilie Ardelia Smart will out of her own estate supply the moneys necessary for the maintenance at Toronto of the household and family of them, the said David and Emilie Ardelia Smart. And that so long as they continue to live together such residence shall be at the city of Toronto or such other place as may be mutually agreed upon between them; but the said David Smart may contribute to the expenses of the household if he sees fit.

“ That if at at an time hereafter the said David Smart shall give way to habits of intemperance, then that the said Emilie Ardelia Smart may at all times thenceforth during her natural life, live separate and apart from the said David Smart, and reside and be at such place and places and in such family and families and with such relations, friends, and other persons as she the said Emilie Ardelia Smart from time to time may choose at her will and pleasure, notwithstanding her present coverture and as if she were a *feme sole* and unmarried woman, and that the said David Smart shall not, nor will at any time or times thereafter compel the said Emilie Ardelia Smart to cohabit with him, and molest or trouble her for such living separate and apart from him, and other person whatsoever for receiving her or entertaining her, nor shall nor will without the consent of the said Emilie Ardelia Smart visit her, or enter or go into any house or place where she shall or may reside or be, or send or cause to be sent any letter or message to her. That should the said David Smart return to his intemperate habits, the said Emilie Ardelia Smart is to be at liberty and may at all times thereafter have the exclusive control, custody, care, management, and protection of their said children. And the said Emilie Ardelia Smart shall be at liberty to apply, if necessary, to the proper Court in that behalf for an order giving and assuring to her such sole custody, care, management, and protection and control of the said children, the said Emilie Ardelia Smart undertaking to educate and maintain the said children and to do for them to the utmost of her ability. Provided always, that should the said David

Smart abandon the said habit to the satisfaction of the said Court, the said David Smart may apply to such Court for such order in his favor.

“That the said David Smart will forthwith convey to the said W. H. Beatty, the surviving trustee in an indenture made on the third day of December, 1878, between James G. Worts of the first part, and James G. Worts and William Henry Beatty, of the second part, and David Smart, of the third part, and Emilie Ardelia Smart, of the fourth part, and on the trusts as in the said indenture of settlement mentioned, the remainder of the property owned by him adjacent to the land already conveyed to the said trustee, and his other lands in Port Hope, by said indenture of settlement, but the property embraced in such settlement known as Hibbert, shall not be sold for two years without the consent in writing of said Smart.

“That this document shall be placed in the custody of the Toronto General Trusts Company, subject to the joint control of Samuel Hume Blake and John Hoskin. And in the event of the death of either the said David Smart or Emilie Ardelia Smart, it shall be delivered to the survivor.

“In witness whereof the said parties to these presents have set their hands and seals the day and year first above written.

“Signed, sealed, and delivered in presence of

“W. H. BEATTY.

“D. SMART. [L.S.]

“EMILIE SMART.” [L.S.]

“That pursuant to the said agreement, I advanced for the said David Smart, the sum of \$8000, to pay his debts, and the said David Smart and I and the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, once more lived together; that after the execution of the said agreement, and in or about the month of October, 1884, the said David Smart and I and the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, went for a visit of some months to the State of California, one of the United States of America, that while there, and in or about the month of May, 1885,

the said David Smart gave way once more to habits of intemperance, and from that time until the time I was forced to leave him, as hereinafter set forth, the said David Smart was habitually and each day intoxicated, and so much under the influence of liquor as to be unfit and unable to have the care of the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, and the habits of intoxication of the said David Smart, and his bad temper on account thereof, so much affected me that thereby my health was again being very seriously broken, and my whole constitution was being ruined, and my life endangered. That the said David Smart, on several occasions, while residing in the said State of California, and in the house of his sister in San Francisco, and while very much under the influence of liquor and while unable to walk steadily, took the said infant David Worts Smart and placed him upon his shoulders, and compelled him while there to stand upright, without holding on to any support, and with the said David Worts Smart in this position, staggered across the room, whereby the said infant David Worts Smart was greatly terrified, and was in great danger of being dashed to the ground and seriously injured, and whereby I have been terribly agitated and alarmed, and whereby my nervous system has been overstrained and injured; that in the month of September, 1885, for the reasons above mentioned I returned with the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, to the city of Toronto, where I have been ever since and am now residing with the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart; and immediately thereafter the said David Smart also returned from California to the said city of Toronto, and and threatened to make application to obtain the custody of the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, but believing, as the fact is, that the said David Smart was not entitled to the custody of the said infants, Mabel Beatrice Smart, Lillian

Constance Smart, and David Worts Smart, but that I was myself entitled to their custody, and on the fifth day of October, 1885, caused to be entered in the High Court of Justice, Chancery Division, an action against the said David Smart to have it declared that I was and am entitled to the exclusive control, care, custody, management, and protection of the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, pursuant to aforesaid agreement of the 2nd of May, 1884, because the said David Smart was and is unfit to manage, control, or protect the said infants Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, and for an order restraining the said David Smart from at all interfering with the said infants or my control or management of them, and from molesting or troubling me for living apart from him, and from visiting or going into any house where I might reside, and from sending or causing to be sent any letter or message to me; that the said David Smart was duly served with a copy of the writ of summons in said action and appeared to the said writ by his solicitor: that thereafter such negotiations took place between the solicitor for the said David Smart and my solicitor, that on or about the 23rd day of November, 1885, an agreement under seal was entered into between the said David Smart and me in the words following:

“‘This indenture made the 23rd day of November, A.D. 1885, between David Smart, of the town of Port Hope, barrister-at-law, and Emilie Ardelia Smart, of the city of Toronto, in the county of York, married woman.

“‘1. This agreement is made supplemental to the agreement entered into between the same parties, and dated the 2nd of May, 1884.

“‘And whereas, under the terms of the said agreement the said Emilie Ardelia Smart claims to be entitled to the possession of her three children.

“‘And whereas the said David Smart has requested the said Emilie Ardelia Smart to give him a covenant as to his dealing with the same, and as to other matters: And

whereas in pursuance of such request this agreement has been entered into between the said parties. Now this indenture witnesseth that in pursuance of the covenants entered into herein by and between the said parties, the said Emilie Ardelia Smart covenants, promises, and agrees to and with the said David Smart that she will maintain, educate, and clothe, and otherwise provide for each of the said three children at her own expense. And the said Emilie Ardelia Smart further covenants to and with the said David Smart to bring up the said children in the faith and practice of the Church of England, and that she will not take them to reside away from the city of Toronto.

“The said Emilie Ardelia Smart further covenants to permit the said David Smart to see the children alone for an hour at the up town office of Messrs. Gooderham & Worts, in the city of Toronto, once a week, on Monday from half-past one o'clock afternoon, to half-past two o'clock, afternoon.

“The said Emilie Ardelia Smart further covenants to and with the said David Smart that she will indemnify and hold him harmless against any expenses, debts, or moneys in respect of her own maintenance and expenses, as well as the maintenance, education, and expenses of the said children.

“The said Emilie Ardelia Smart further covenants that she will deal with the children as above mentioned, and that she will not remove them as above mentioned, and that she will not in any way molest, interfere with, attempt to see, or correspond with, or visit the said David Smart.

“And the said David Smart covenants with the said Emilie Ardelia Smart, that he will not in any way molest, or interfere with, attempt to see, correspond with, or visit the said Emilie Ardelia Smart, nor will he in any way interfere with her dealing with the said children, nor in any manner attempt to get possession of them, or to withdraw, or allure them from the custody of the said Emilie Ardelia Smart, or take them from or out of the said office.

“It is further covenanted and agreed between the said parties, that this agreement is to be read in connexion with the agreement of the 2nd of May, 1884, and is not to vary it, except in so far as herein provided.

“It is further agreed that the suit which is at present pending between the said Emilie Ardelia Smart, as plaintiff, and the said David Smart, as defendant, is to be in the meantime stayed, and if the^d suit for any cause shall be hereafter proceeded with, the parties are in respect thereof to be in the same position as they are the day this agreement is executed.

“In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

“ ‘ DAVID SMART.

“Signed, sealed, and delivered in
presence of (as to the execution
by David Smart.)

“ HENRY J. SCOTT.’ ”

“That ever since the execution of the said last mentioned agreement, I have lived at the said city of Toronto, with the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, and have maintained, educated, and clothed, and in every way provided for each of them at my own expense, and have brought them up in the faith and practice of the Church of England, and have not taken them to reside from the City of Toronto, and have permitted the said David Smart to see them alone as in the said agreement provided. The said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, are under my care as their mother, and are of tender years, and it is for their best interests that they should not be removed from my care; that the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, are attached to me and desire to be left with me; that I am possessed of large means in my own right and am able to maintain and bring up the said infants, Mabel Beatrice

Smart, Lillian Constance Smart, and David Worts Smart, in the manner fitted to their needs and positions in life ; that the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, will be benefited by being left in my care and custody ; that the said David Smart is addicted to the habitual excessive use of intoxicating liquors, and is unfit to have the care and charge of the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart ; that the said David Smart is not possessed of sufficient means to enable him to maintain, support, and educate the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, in the manner fitted to their needs and position in life, and has no home to take them to ; that the said infants will suffer in their persons and estate if they are given into the custody or control of the said David Smart ; that I cannot myself live with the said David Smart without greatly endangering my life, and the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, cannot be properly cared for and maintained by any person except me ; that it is for the best interests of the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, that the aforesaid agreements, which the said David Smart made and entered into with me, should be enforced against him, and that the said infants, Mabel Beatrice Smart, Lillian Constance Smart, and David Worts Smart, should be left in my custody."

"Dated this 15th day of September, 1886."

"EMILIE A. SMART."

This return to the writ was filed on the 21st of October, 1886, and on the same day the argument as to the sufficiency or not of the return took place.

It appears by the return that all the infants are under the age of twelve years. This is the age mentioned in the R. S. O. ch. 130, sec. 1. In the contention against the sufficiency of this return to the writ, reliance was placed upon the common law right of the father to the

custody of his children, and it was argued with great apparent force that unless the return on its face disclosed such facts as would at common law disentitle the father to such custody, the return should be held to be insufficient. It was also contended that the agreements entered into by the father, as shown by the return, were not binding upon him, as he was incapable of making a valid contract disposing of the care and custody of his children.

It was also contended that the return shewed that the infants were in a custody which is not a legal custody, and that for this reason it was bad and insufficient. It was also urged that the return does not shew or disclose any act or default of the father that would at common law disentitle him to the custody of his children, and that it is for this reason insufficient. I think every possible contention against the sufficiency of the return was made by counsel, and a large number of authorities referred to. These contentions, as I understood them, had reference to the common law right of the father, and it was said that this alone could be looked at in proceedings upon a writ of *habeas corpus* in this country, and that the statutory provisions with regard to the custody of infants should not be taken into consideration in determining the question to be determined here.

In the case *In re Murdoch*, 9 P. R. 132, Mr. Justice Osler says: "The father has obtained a writ of *habeas corpus* to compel the delivery of the child to him, and he relies upon the common law right of a father to such custody."

The learned Judge further says: "That right has been considerably modified of late years by statute, under which there have been several decisions which must give the rule for the present case." He then refers to some of the cases under the statute.

In the argument before me, the case *In re Murdoch* was referred to, and counsel, contending against the sufficiency in law of the return, stated that the ground relied on by him had not been taken by counsel in the argument

before Mr. Justice Osler, and had not, so far as appeared, been considered by him. I have since had an opportunity to confer with the learned Judge, and I am authorized to say that the identical matter was fully considered by him, and that what is said in his judgment, and referred to above, is his deliberate conclusion upon the subject. The conclusion itself is clearly, though shortly, stated in the reported judgment. Such being the circumstances, I am bound to adopt the rule stated and acted upon by the learned Judge, unless I undertake to review the decision, which I have not the remotest idea of attempting at present. The return to the writ in the present case must then, I think, be considered in the light not only of the common law, but in that of the statute law as well, that is in the light of all the existing law upon the subject. Counsel, however, contended that in considering this matter the statute law could not constitute an element of the consideration, because the mother had not a petition before the Court: that she is not asking anything. One answer to this is, that she is not in a position to petition for the custody of her children or for access to them, for she has the custody of them.

In considering whether or not the return in question is "good and sufficient in law," the statements contained in it must, for the time being, be taken to be true, and, if it be assumed that all the statements in it are in fact true, and the matter is to be considered under the common law, modified, as indicated in the case *In re Murdoch*, by statute, it seems to me that the return must be held to be sufficient. I think that this scarcely admits of a doubt. I am of the opinion that there are individual statements in the return, some of which taken respectively by themselves would constitute a return good and sufficient, but I am not called upon to go so far as this, and, perhaps, under the circumstances it would be imprudent to say more on the immediate subject.

I am of the opinion that the return to the writ is good and sufficient in law.

It was said and, I think, agreed that counsel should be heard as to the course to be adopted in proceeding "to examine into the truth of the facts set forth in the return," and on this subject I am willing to hear what may be proposed or urged. This at any convenient time. I apprehend nothing need be said at present as to costs; if counsel think the contrary, I will at the same time hear what may be urged on this subject.

RE McDougall Trusts.

Infants' money—Payment out of Court—Directions of will.

A sum of money left by McD. in his will to his daughter, who predeceased him, was paid into Court by McD.'s executors. The daughter by her will had disposed of the moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' shares and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reason to anticipate danger to the money if paid out to the executor. *Held*, that the will of the testatrix should be respected, and the infants' money paid out to the executor.

[November 8, 1886.—*Ferguson, J.*]

THE executors of the will of John McDougall paid into court \$2,016, a sum of money bequeathed by the testator to his daughter Catherine McEwan, who died before him, leaving a will which had not been admitted to probate at the time the money was paid into Court. Catherine McEwan by her will bequeathed part of the sum which she expected under her father's will to her husband, Peter McEwan, and part to her infant children. She named her husband executor, and directed him to invest the infants' share and to expend the interest for their maintenance till they respectively attained their majorities.

Watson, now applied for the payment out to Peter McEwan of the whole sum of \$2,016.

John Hoskin, Q. C., for the infants, admitted that if the moneys had not been paid into Court they would properly have been paid over to the applicant, but submitted that as the infants' money actually was in Court, the general rule should prevail, and the Court should retain the money for the infants' benefit till they attained twenty-one; citing *Kingsmill v. Miller*, 15 Gr. 171.

It was agreed by counsel that there was no reason to anticipate that the moneys if paid out to the executor would be wrongfully applied.

FERGUSON, J.—After conferring with the Chancellor, I think there is no real doubt that the money should be paid out to the husband and executor, to be by him employed according to the direction in the will of his late wife. The will of the testatrix should be respected, and effect should be given to her directions unless there is a strong reason indeed for not doing so. In this case it is agreed that there is no danger to the money contemplated. It did not come into court as infants' money at all. In one sense it may be said not to be properly in court. The order will go as asked.

TAYLOR V. THE SISTERS OF CHARITY OF OTTAWA.

Appeal—New affidavits—Ex parte order.

Leave was given to the defendants to read new affidavits upon their appeal from an order obtained *ex parte* by the plaintiff.

[November 10, 1886.—*Ferguson, J.*]

THE defendants appealed from an order of the local Master at Ottawa allowing the plaintiff to examine one Gendreau as an officer of the defendants, an incorporated society.

The appeal was upon the ground that Gendreau was not in fact an officer of the defendants.

The order of the local Master was made *ex parte* upon the application of the plaintiff.

Hoyles, for the appellants, asked for leave to read affidavits upon the appeal. The order having been made *ex parte* there was no opportunity of filing affidavits before the Master, and the proper course was to appeal, as the decisions shew that even an *ex parte* order cannot be rescinded except upon an appeal: *Ryan v. Canada Southern R. W. Co.*, 10 P. R. 536; *Jamieson v. Prince Albert Colonization Co.*, 11 P. R. 115; *McNabb v. Oppenheimer*, 11 P. R. 214.

W. M. Douglas, for the respondent.

FERGUSON, J., gave leave to the appellants to read new affidavits upon the appeal, for the reason that the order appealed from was made *ex parte*.

REGINA V. ORGAN.

Vagrant—Conviction—Evidence—32 & 33 Vic. ch. 28, sec. 1, (D.)

The defendant was summarily convicted under 32 & 33 Vic. ch. 28, sec. 1, (D.), as "a person who, having no peaceable profession or calling to maintain himself by, but who does, for the most part, support himself by crime, and then was a vagrant," &c.

The evidence shewed that the defendant did not support himself by any peaceable profession or calling, and that he consorted with thieves and reputed thieves; but the witnesses did not positively say that he supported himself by crime.

Held, that it was not to be inferred that the defendant supported himself by crime; that to sustain the conviction there should have been statements that witnesses believed he got his living by thieving, or by aiding and acting with thieves, or by such other acts and means as shewed he was pursuing crime.

[November 11, 1886.—*Wilson, C. J.*]

MOTION for *habeas corpus* and *certiorari* to bring up the proceedings on which the defendant was convicted.

The information stated that the prisoner, on the 20th of September, 1886, at the city of Toronto, was a person having no peaceable profession or calling to maintain himself by, but who does for the most part support himself by crime, and then was a vagrant, loose, idle, and disorderly person within the meaning of the Act respecting vagrants, and against the form of the statute, &c.

The prisoner pleaded not guilty. The evidence was very short.

Constable Burrows said: I know the prisoner. He does not do any work that I know of. I see him going about the streets doing nothing, in company with thieves and reputed thieves.

George W. Frakes said: I know the prisoner, he has been a convict in the Central Prison twice for crimes, to my knowledge.

Constable Newhall said: I know prisoner. I never knew him to do any honest work. I have known him fourteen or fifteen years. He has been here only at intervals. He has been here this time about six weeks. I have not seen him for some years before.

Two previous convictions were proved against the prisoner who was remanded from time to time until the 1st of November.

The warrant was directed to issue, as the prisoner failed to appear.

The conviction was, that the prisoner be imprisoned in gaol at hard labour, for ten days.

Bigelow, for the prisoner, argued the case, (the Attorney General consenting that the case should be heard for the prisoner without his appearing to shew cause.

For the prisoner it was said the evidence did not prove the offence, and the effect of his having served for the periods of imprisonment under the former convictions, was to admit him to all his civil rights; in the words of the 32 & 33 Vic. ch. 29, sec. 128, (D.), "The punishment so endured shall, as to the felony whereof the offender was convicted, have the like effects and consequences as a pardon under the Great Seal."

WILSON, C. J.—The effect of an offender undergoing the punishment imposed upon him in being remitted in full to all his civil rights does not arise here, for the defendant has not served the term of his imprisonment; and secondly, the defendant is not convicted of a felony, but for a misdemeanor only, and in such a case there is no forfeiture of civil rights, unless the offence is of an infamous nature, such as perjury.

I have only to determine whether there is any evidence to sustain the conviction.

The 32 & 33 Vic. ch. 28, sec. 1 (D.), enacts that "All idle persons who, not having visible means of maintaining themselves, live without employment * * all persons who have no peaceable profession or calling to maintain themselves by, but who do for the most part support themselves by gaming or crime or by the avails of prostitution shall be deemed vagrants, loose, idle, or disorderly per-

sons within the meaning of this Act, and shall, upon conviction, * * be deemed guilty of a misdemeanor and be punished by imprisonment in any gaol or place of confinement other than the Penitentiary, for a term not exceeding two months, (a) and with or without hard labour, or by a fine not exceeding \$50, or by both, such fine and imprisonment being in the discretion of the convicting magistrate or justices." See also, 44 Vic. ch. 31, (D).

The conviction in this case is upon that part of the section which begins by the words "all persons who have no peaceable profession or calling, &c., but who do for the most part, &c."

One witness said: "The prisoner does not do any work that I know of. I see him going about the streets doing nothing, in company with thieves and reputed thieves." Another witness said: "I have known the defendant for fourteen or fifteen years. I never knew him to do any honest work." And a third witness said: "I knew the prisoner, he has been a convict in the Central Prison twice for crimes, to my knowledge."

Does that evidence shew the defendant to be a person having no peaceable profession or calling to maintain himself by, but who does for the most part support himself by crime? If so, he is to be deemed a vagrant, loose, idle, or disorderly person, within the meaning of the statute.

A person who for fourteen or fifteen years has never been known by one who knows him, to do any honest work, and who does not do any work that another witness says he knows of, although he says he knows the defendant, and who also says he sees the defendant going about the streets doing nothing, in company with thieves and reputed thieves, and has been twice in the Central Prison as a convict, is shewn sufficiently to be "an idle person not having visible means of maintaining himself without employment" under the first part of that section of the Act.

(a) By 37 Vic. ch. 43, sec. 1 (D.), the term of imprisonment is extended to six months.

but that is not the part of the section under which the defendant has been convicted.

I am of opinion the evidence does shew, or that it may fairly be inferred from it, that the defendant "has no peaceable profession or calling," and I think also the additional part of that clause may also be properly inferred, that the defendant has no peaceable profession or calling "to maintain himself by." He was in presence of the magistrate—his station or rank in life would not, or might not, warrant the magistrate in believing the defendant could live without a profession or calling in idleness, when he was consorting with thieves and reputed thieves, and had before been a convict upon two occasions.

The latter part of the clause, "but who for the most supports himself by crime," has to be considered. The defendant may not support himself by any peaceable profession or calling, and I think the evidence may sustain that part of the charge. But does that shew that the defendant for the most part supports himself by crime? It does not in positive terms—does it do so negatively? The argument is this. The defendant does not support himself by any peaceable profession or calling; therefore he supports himself by crime. Is that a just conclusion? He might not support himself by a peaceable profession or calling, and yet he might not support himself by crime. He might not contribute to his support at all. He might be supported at his home, if he has one, or by charity, or by the willing aid of his friends, although he was an idle good-for-nothing. I think the evidence should have shewn, although the defendant was consorting with thieves or reputed thieves, that the witnesses believed he got his support for the most part, as they verily believed, by thieving, or by aiding and acting with thieves, or by such other acts and means as shewed he was pursuing crime of some kind for his livelihood. It might as well be inferred from this evidence he supported himself *by gaming or by the avails of prostitution*,—the other parts of the same clause of the Act—as *by crime*.

I think I must hold the evidence does not shew nor warrant the inference that the defendant "does for the most part support himself [by crime," although there is reason to suspect that he does so by some irregular course of life, but not necessarily by *crime*.

The writ of *habeas corpus* to the gaoler, and a *certiorari* to bring up the proceedings directed to the Police Magistrate, must go, but it may not be necessary actually to issue these writs, as the time of imprisonment imposed upon the defendant has now expired.

*Order absolute for habeas corpus and
certiorari to issue.*

CHAMBERLAIN ET AL. V. CHAMBERLIN ET AL.

*Pleading—Claim arising since action—Set-off—Counter-claim—Striking out
inapplicable defence.*

The Judicature Act has not changed the law so as to allow of a claim arising since the commencement of the action being pleaded as a set-off, although it may be made the subject of counter-claim.

Therefore, where a defence of money due to defendants by the plaintiffs, part of which accrued before and part after action brought, was pleaded as a set-off, the order of a local Judge directing the defendants to amend by confining their plea of set-off to those debts which accrued before the commencement of the action, was affirmed.

A defence which is wholly inapplicable may be struck out, unless amended, although it is neither scandalous nor tending to prejudice, embarrass, or delay.

[November 16, 1886.—*Ferguson, J.*]

AN appeal by the defendants from an order of the local Master at Peterborough.

The facts appear in the judgment.

E. Douglas Armour, for the appellants, referred to Rules 127, 151, 169, 184, O. J. A., and to *Snider v. Snider*, 11 P. R. 140; *Rolfe v. Maclaren*, 3 Ch. D. 106; *Beddall v. Maitland*, 17 Ch. D. 174.

Edminson, for the plaintiff, cited *Foster v. Gamgee*, 1 Q. B. D. 666, and Rule 157, O. J. A.

FERGUSON, J.—The order appealed from is, that the defendants do, within, &c., amend their pleas of set-off, in their statement of defence contained, by confining their claims thereunder to the amounts accrued due up to the commencement of the action, and that they be at liberty to plead by way of counter-claim the claims set up in the set-off, and also such claims as have accrued due since the commencement of the action. The appellants' complaint is against the former part of this order. It appears and it is not denied that the defendants have set up by way of set-off debts or claims that accrued due after the commencement of the suit, and they say that by the provisions of Rule 151 they are authorized to do this, and that there is no provision of the Judicature Act, by which they are bound to say whether the matter of defence arose or accrued due before or after the commencement of the suit or action. The 97th section of the Common Law Procedure Act contains a similar provision as to pleading defences arising after the commencement of the action, but according to this the defendant must, when he pleads a defence arising after action, state whether it arose before or after action, otherwise the plea would be deemed to be a plea of matter arising before action. On the argument of the appeal there was much contention as to the meaning of various clauses of the Judicature Act; but it appears to me that the real matter on which the decision must turn lies in another direction. It was amongst other things contended that there was no power to make the order to amend, because the statements were not scandalous, nor did they tend to prejudice, embarrass, or delay. This, I think, applied only to the form of the order, for it can scarcely be doubted that a Judge may order a plea that is wholly inapplicable to be struck out unless amended.

In the case *Richards v. James*, 2 Ex. 471, it was held that owing to the peculiar wording of the statute, 2 Geo. II. ch. 22, sec. 13, a debt which arises after action brought could not be the subject of a set-off. The language of the plea of set-off is understood as applying to the state of accounts between the plaintiff and defendant at the commencement of the suit. The defendant alleges that the plaintiff was, at the time the action was commenced, indebted to him in an amount equal to or greater than the plaintiff's claim, and that such debt is still owing to him, the defendant. See *Spradberry v. Gillam*, 2 L. M. & P. 366. Only mutual debts could be set off. The right to set off at all depends upon the provision of the statutes respecting set-off. The formal plea of set-off was undoubtedly framed in view of what have been called the peculiar provisions of one of the sections of that statute.

The set-off mentioned in the Common Law Procedure Act, and the set-off mentioned in the Judicature Act must in this particular view be held to mean a set-off under the statutes authorizing a set-off. Rule 127 of the Judicature Act, it is true, provides for the pleading of a set-off or counter-claim sounding in damages, which as to the set-off could not be done under the former law; but this provision seems to be confined to the nature of the defendant's demand that may be set off, and only changes the former law in this particular, and it is quite consistent with this, that the debt or claim sounding in damages to be set off by the defendant must have arisen or accrued due before the commencement of the action.

The rules of equity must, I suppose, prevail if there is a difference between these and the rules of law. In view of a Court of Equity the setting off of claims between the same parties is extremely just, and where there is any technical difficulty in the way of this being done without an agreement, a Court of Equity will receive slighter evidence of an agreement than is usually required: *Lundy v. McCulla*, 11 Gr. 368. This is, however, from the strong sense of want of equity there is in resisting the set-off

proposed. There is here no agreement nor is there want of equity in resisting the set-off. I am not referred to any case in equity meeting the point in the present case, and shewing that a claim arising after suit has been made the subject of a set-off in that suit. There is to me difficulty in understanding the whole meaning of the Legislature in their use of the word "set-off" in the Judicature Act; but I think it is in the nature of a set-off, as such, that it should be a claim having its existence as a demand at or before the commencement of the suit in which it is sought to be used as a set-off, although it is different with a counter-claim.

I therefore think that the order is right, and that it should be affirmed, and that the appeal should be dismissed, with costs. I may add that I am not pressed with any equity in favour of the defendants' contention.

DOMINION BANK v. HEFFERNAN ET AL.

Costs, scale of—Attacking fraudulent conveyance—Amount of claim—Creditors' Relief Act, 1880, (O.)

The plaintiffs had judgment and execution against one of the defendants for less than \$200, and sought in this action, though not on behalf of all creditors, to set aside a conveyance by that defendant to the other, as fraudulent. At the trial this action was dismissed. At the time it was brought the sheriff had other executions in his hands against the same defendant, amounting to more than \$200.

Held, that if the plaintiffs had been successful all the executions must have been satisfied out of the property covered by the impeached conveyance, and the provisions of the Creditors' Relief Act would have applied to the case, and therefore the amount of the subject matter involved exceeded \$200, and the costs were taxable on the High Court scale.

It is proper practice to obtain a direction of a Judge as to the scale of costs before they are taxed.

[November 18, 1886.—*Ferguson, J.*]

THE plaintiffs, who were execution creditors of John Horan, one of the defendants, brought this action to set aside an alleged fraudulent conveyance from Horan to the

other defendant. At the trial at Goderich the action was dismissed, with costs.

The amount of the plaintiff's judgment against Horan was \$140.94 and costs, and his whole claim on which the action was founded, was less than \$200. The suit was not brought on behalf of all creditors.

It was admitted that at the time of issuing the writ of summons in this action there were executions in the hands of the sheriff against the lands of Horan, amounting to more than \$200.

The defendants now moved for a direction to have the costs taxed on the High Court scale.

Holman, for the defendants, contended that the effect of a judgment in plaintiffs' favour would have been to let in all execution creditors under the Creditors' Relief Act, and that, for this reason, the suit was beyond the jurisdiction of the equity side of the County Court, and therefore the defendants were entitled to full costs against the plaintiff.

Leeming, for the plaintiffs, contra. The defendants have no right to come here before going before the taxing officer. The subject matter involved must be taken to be the amount of the debt due to the plaintiff.

The authorities referred to are cited in the judgment.

FERGUSON, J.—The amount of the debt owing to the plaintiffs was less than \$200 (about \$150). They asked that one of the defendants should be declared a trustee for another of the defendants of property of large value, several thousands of dollars, or that the conveyance from the one to the other of this property should be declared fraudulent and void as against the plaintiff and other creditors of their execution debtor, one of these defendants. Against this defendant there were in the hands of the proper sheriff executions against goods and lands amounting in all to a sum much above \$200. These were to be satisfied out of the same property if the plaintiffs had been successful, and the provisions of the Creditors' Relief Act.

would have applied to the case. In the case *Seath v. McIlroy*, 2 Ch. Chamb. R. 93, a suit for the foreclosure of a mortgage, the plaintiff's claim was less than \$200, but this, with the amount of a subsequent mortgage on the same property, exceeded \$200, and the learned Secretary held in Chambers that the suit was beyond the jurisdiction of the County Court on its equity side. There are some passages in the case *Hyman v. Roots*, 11 Gr. 202, which seem to me to support this view. The case *Brough v. Brantford, &c.*, 25 Gr. 43, seems to shew that matters apart from the actual amount of the plaintiff's money demand may be taken into account in considering this question.

The cases *Forrest v. Laycock*, 18 Gr. 611, and *Ferguson v. Rutledge*, 18 Gr. 511, to which counsel referred me, do not, I think, strictly apply since the coming into operation of the Creditors' Relief Act. In *Forrest v. Laycock*, however, some stress is laid on the fact that there did not appear to be any other creditors. Looking at the matters appearing in the action, and the effect of the decisions as to the meaning of the Creditors' Relief Act, I do not see my way to saying that the amount of the subject matter involved in this action was less than the sum of \$200. I am, on the contrary of this, of the opinion that the amount of the subject matter that must be considered to have been involved in the action far exceeded the sum of \$200. This expression of opinion is all that is asked.

It was contended that the matter should first have gone to a taxation, and that if the costs were not considered to have been taxed according to the proper scale, then an appeal might have been had, and that this motion is not according to proper practice. I fail to perceive any impropriety or inconvenience in asking for this statement of opinion at the present time. I think there should be no costs of the application. See also *Mitchell v. Martin*, 2 C. L. J. N. S. 249, and cases cited in 1 *Holmested's R. & O.* under order 553, pp. 223 *et seq*; also *MacLennan's Jud. Act.*, 2nd ed., pp. 530, 531, as to cases on the subject before the Creditors' Relief Act.

PURVES V. SLATER.

Service out of Ontario—Debts—Assets in Ontario—Rule 45 (e), O. J. A.

Debts owing to the defendant from persons living in Ontario are assets in Ontario which may be rendered liable to the judgment, within the meaning of Rule 45 (e), O. J. A.

[November 26, 1886.—*Rose, J.*]

THIS was an appeal from an order of the Master in Chambers dismissing an application to set aside the writ of summons, and the copy and service on the defendant, on the ground that the defendant resided out of the Province of Ontario, and that service was not allowable under any one of the provisions of Rule 45, O. J. A.

The learned Master held that debts owing to the defendant from customers in Ontario to whom sales had been made, and which in the event of judgment being obtained might be "attached to answer the judgment" under marginal Rule 370, O. J. A., were "assets in Ontario * * which may be rendered liable to the judgment" within the meaning of Rule 45 (e.)

It was admitted that there were such debts exceeding in value \$200, but it was contended they were not assets which could be rendered liable to the judgment, and that such language only covered assets exigible under a writ of execution in the hands of the sheriff.

Shepley, for the appeal.

Walter Read, contra.

ROSE, J.—It seems to me the words "rendered liable to the judgment," taken literally, have little force or meaning. In one sense no assets are or can be rendered liable to a judgment. A judgment as such binds neither goods nor lands, but if the words are taken to mean "rendered liable to satisfy the judgment" then it seems to me the section is intelligible, and but little difficulty will arise in giving full effect to its provisions.

In order to render assets liable to satisfy the judgment, some further process is required after judgment.

If a writ of *fiery facias* is issued, the sheriff is commanded to seize and sell the assets and so apply the money as to satisfy the judgment.

If the judgment creditor desires to obtain satisfaction out of debts owing to the judgment debtor, he obtains an order from the Court directing the third person to shew cause why he should not pay to the judgment creditor the debt due by him to the judgment debtor, and failing cause then to pay the same. If he fail to pay then execution is issued to levy the amount.

By the first step the debts due by the third person are "attached to answer the judgment," and this results or may result in execution being issued against such third person.

What is attached is the debt, payment of which is thus enforced.

I cannot see any reason why the language of the statute should be so confined as the defendant contends. As I understand it, the provision, sub-sec. (e), was introduced so as to enable parties to obtain the judgment of the Court in a case not previously provided for, that is where there were assets within the jurisdiction which could be reached to satisfy the judgment, so that the judgment would not be a mere *brutum fulmen*.

It is only necessary in order to dispose of this appeal to say that I am unable to determine that the words will not have the construction put upon them by the learned Master, but I say further, that in my opinion that construction is the proper one.

The appeal must be dismissed, with costs.

I am informed by Mr. Read that the same result was reached by my learned brother Galt in a case of *Wigg v. Ritchie*, in which, on the 18th of March, 1884, a similar appeal from the learned Master was dismissed, with costs, but no written judgment was delivered. I have referred to my learned brother's note book, and his brief entry confirms Mr. Read's recollection.

CAMPBELL V. MARTIN.

Motion, enlargement of—Terms, violation of—Contempt of Court—Imprisonment—Discharge—Costs.

Where a party obtains an enlargement of a motion for the purpose of procuring further affidavits, but does not comply with the terms on which the enlargement was granted, he is not entitled to read the affidavits.

Where a party is in prison for contempt, and has apologized, but has not paid the costs of his committal, &c., the proper order to make upon a motion for his discharge, is, that he be continued in prison for his contempt for a time certain, unless the costs of the proceedings against him are sooner paid.

[November 2 and 27, 1886.—*Ferguson, J.*]

THIS was a motion to commit the plaintiff for contempt of Court in interfering with the receiver appointed by the Court in his taking possession of the property in question. The motion first came on to be heard on the 22nd of October, when two affidavits were read in answer to the motion, and an enlargement was asked for by the plaintiff for the purpose of procuring further affidavits. The enlargement was granted upon the plaintiff undertaking to allow the receiver to take possession of the property. The motion came on again to be heard on the 2nd of November, when it appeared that the plaintiff had not allowed the receiver to take possession in the interval. Fresh affidavits were produced on behalf of the plaintiff, which *Holman*, for the plaintiff, desired to read.

Hoyles, for the defendant, asked that the affidavits should not be received on account of the plaintiff's breach of his undertaking.

FERGUSON, J.—The enlargement of the 22nd October was asked and was granted for the purpose of putting in affidavits in answer to the motion. The terms of the enlargement having been violated, the plaintiff is not entitled to put in the affidavits as he proposes to do.

An order was then made for the committal of the plaintiff for his contempt, under which he was arrested and confined in prison.

A motion made on the 10th November for the plaintiff's discharge was dismissed with costs, for irregularity.

Another motion was made on the 26th November for the plaintiff's discharge, and an argument as to the terms of his discharge was heard.

Hoyles, for the defendant, contended that payment of costs should be a condition precedent; citing *Daniell's* Ch. Pr. 901; 2 *Seton* on Decrees, 1593; *Re M.*, 46 L. J. Ch. 24; *Harris v. Myers*, 1 Ch. Chamb. R. 229.

Holman, for the plaintiff, contended that there was no power to detain for non-payment of costs: citing *Pherill v. Pherill*, 2 Ch. Chamb. R. 444; *Jackson v. Mawby*, 1 Ch. D. 86; *Clark v. Clark*, 3 Ch. Chamb. R. 67.

FERGUSON, J.—There is no act now to be done by the plaintiff, who has been in prison since the 6th day of November inst. It is shewn by affidavits that he has no money wherewith to pay any costs, and that he has no means of making money but by his labor. The contempt of which he has been shewn to be guilty I consider a very gross one. His apology seems to be this; first, he contends that he was not guilty; but second, if the Court shall still be of opinion that he is guilty of the contempt, then he apologizes and is willing to make amends, &c. This is scarcely an apology out and out, for it does not contain any admission of the fault or guilt. I am, however, of the opinion that the matter was intended as an apology and am willing to give the plaintiff the benefit of any doubt on the subject. Then under all the circumstances of the case, is an apology alone sufficient to purge or clear the contempt of which the plaintiff has been adjudged guilty? I think it is not. Are the apology and the short imprisonment already undergone sufficient for this purpose? Under the circumstances I think not. I am called upon,

I think, to say what period of imprisonment should be imposed upon the plaintiff for the contempt, and I think the course suggested by the late Chancellor Van-Koughnet in a case before him (*Harris v. Myers*, 1 Ch. Chamb. R. 229,) is the proper one to adopt, that is, to say for what period the plaintiff should be imprisoned or continued in prison unless the costs are sooner paid, and I think this view is not against the provisions of the statute respecting imprisonment for non-payment of costs. I think that statute has no bearing upon the case: see the case *In re M.*, 46 L. J. Ch. 24, 25. The imprisonment in such case is for the contempt and not for the non-payment of costs. It is of great importance that the orders of the Court should be obeyed, otherwise it would be next to impossible to administer the law in a proper manner and for the benefit of the community

I am of the opinion that the plaintiff should not now be discharged, but that at the expiration of one month from to-day he should be discharged. If, however, the costs of the motion for his committal, the costs of an irregular motion for his discharge, and of this motion be in the meantime paid by the plaintiff, I think that upon such payment he should be discharged. If these costs are not sooner paid and the plaintiff's discharge takes place at the end or expiration of one month, as aforesaid, then the defendant may apply in respect of these costs.

The order will be accordingly.

RE LEGARIE ET AL. V. THE CANADA LOAN AND BANKING CO.

Division Court—Prohibition—Equitable claim—Surplus in hands of mortgagee.

A Division Court has jurisdiction to entertain a claim for less than \$100 made by a mortgagor upon the surplus proceeds of a mortgage sale which realized less than \$400. Such a claim is an equitable cause of action for money had and received.

[November 29, 1886.—*Boyd, C.*]

THIS was an application by the defendants for prohibition to the Ninth Division Court of the County of Wentworth, to restrain the hearing of this plaint, which was for an alleged balance due to the plaintiffs, after deducting the amount to which the defendants were entitled out of the proceeds of a sale made by them of lands mortgaged to them by a deceased mortgagor, represented by the plaintiffs. The amount claimed was \$60, and the whole amount realized by the sale was \$380.

Washington, for the applicants, contended that a Division Court had no jurisdiction, because the claim was an equitable one against trustees, and because it involved the taking of mortgage accounts for which the Division Court had no machinery. He referred to *Morton v. The Hamilton Provident and Loan Co.*, 10 P. R. 636; 11 P. R. 82; *McGillicuddy v. Griffin*, 20 Gr. 81; *McPherson v. Proudfoot*, 2 C. P. 57; 32 Geo. III ch. 6; 4 and 5 Vic. ch. 3; C. S. U. C. ch. 15 sec. 17, sub-secs. 1, 2, sec. 34, sub-secs. 7 and 8; *Re Willing v. Elliott*, 37 U. C. R. 320; *Ex p. Martin*, 4 Q. B. D. 212.

Holman, for the plaintiffs, was not called upon.

BOYD, C.—The Division Court has always been considered a Court of Equity and good conscience, as it is declared to be by R. S. O. ch. 47, sec. 54, sub-sec. 2, and it would be a retrogression to hold that it cannot entertain a plaint like this. It is covered by the language of that

section as amended by 41 Vic. ch. 8, sec. 6 (O.) This is nothing more than an equitable cause of action for money had and received. The Judge of the Division Court is equipped in such a case with all the powers of a Court of Equity, and can do justice in the premises.

Motion refused, with costs.

DART V. CITIZENS INSURANCE COMPANY.

Defence—Jurisdiction—Service—Appearance.

The defendants appeared to the writ of summons, and set up in their statement of defence that the High Court of Justice had no jurisdiction; that the cause of action arose in Winnipeg, the defendants' head office was at Montreal, and the service of process was on their agent for local purposes at London.

Held, that there was nothing in these facts to shew want of jurisdiction; and that the appearance had precluded all question as to the sufficiency of the service.

[December 8, 1886.—*The Master in Chambers.*]

An action in the High Court of Justice upon an insurance policy.

The first paragraph of the statement of defence was as follows:

“The defendants deny the jurisdiction of this Court to try this action. The cause of action, if any, arose in Winnipeg, and the defendants' head place of business is in Montreal. The service of process was on their agent for local purposes at London.”

Rae, for the plaintiff, moved to strike out this paragraph of the defence.

Aylesworth, for the defendants, contra.

THE MASTER IN CHAMBERS.—I have no doubt there may at this day be a plea to the jurisdiction—and that in the High Court of Justice as well as in an inferior Court. I do not see how it can be otherwise.

The rule used to be that it must be pleaded in person, and could not be joined with other pleas.

The High Court is informed of its own jurisdiction. This action is on a policy of insurance made by defendants—a transitory action—and what the defendants allege in the plea is, that the cause of action arose in Winnipeg; that the head place of business of the defendants is in Montreal; and that the service of process in this suit was on their agent for local purposes only, at London. I understand Winnipeg is in Manitoba, Montreal in the Province of Quebec, and London in Ontario.

The defendants have appeared by attorney in the suit, and I see nothing in any one of these facts, nor in all of them together, to shew a want of jurisdiction in the High Court for Ontario.

If the service of process was irregular it could have been set aside. The appearance to it of the defendants has precluded all question as to the sufficiency of that service.

BURGESS V. CONWAY.

Appeal bond, liability on after appeal allowed—Further appeal pending—Motion, notice of.

A judgment by the Court of Appeal in favour of a defendant appellant puts an end to all liability upon the appeal bond, which may after such judgment be delivered up to the appellant, even where the other party has given notice of appeal to the Supreme Court of Canada.

Notice should be given to the opposite party of a motion to take the appeal bond off the files.

[December 7, 1886.—*The Master in Chambers.*]

[December 14, 1886.—*Galt, J.*]

THE defendant appealed from the judgment of the Queen's Bench Division and filed the usual appeal bond. His appeal was successful, but the plaintiff gave notice of a

further appeal to the Supreme Court of Canada. After such notice had been given, the defendant, under an *ex parte* order, obtained by him from the Master in Chambers, withdrew his appeal bond from the files. The plaintiff now moved for an order to have the bond restored to the files.

Aylesworth, for the plaintiff.

J. M. Duggan, for the defendant.

THE MASTER IN CHAMBERS.—A motion to have restored to the files the bond given as security upon the appeal to the Court of Appeal.

The judgment of the Queen's Bench Division had reversed the judgment for the defendant, given by the Judge who tried the cause, and had entered a judgment for the plaintiff for \$227.35 and costs.

The bond reciting the above and the desire of Conway, the defendant, to appeal from the said judgment of the Queen's Bench to the Court of Appeal, contains this condition: "Now the condition of this obligation is such that if the said Conway shall effectually prosecute such appeal, and if the judgment appealed from or any part thereof shall be affirmed, shall pay the amount directed to be paid by such judgment or the part of such amount, as to which such judgment shall be affirmed, if it be affirmed only in part, and all costs and damages which shall be awarded against the said Conway in the appeal, then the obligation to be void," &c.

It seems to me that the weight of authority is largely in favour of the view that a judgment of the Court of Appeal in favour of a defendant appellant who has given such a security, puts an end to all liability on the security. It is in fact, and such is the wording of the bond, a security against a finding adverse to the party giving the security in that particular proceeding, and a judgment therein in his favour, therefore puts an end to the liability.

I refer to the decision of Mr. Justice Proudfoot in *Re Donovan*, 10 P. R. 71, and the cases there cited, and to the case of *Napier v. Hughes*, 9 P. R. 164.

The case of *Hately v. Merchants' Despatch Co.*, 12 A. R. 640, does not seem to me to bear upon the point.

It would have been much better, I think, had notice been given of the motion to remove the bond from the files, as notice of appeal to the Supreme Court had been given, which I was not informed of. But it could not, in my opinion, have affected the result, for it seems to me a matter of law and right that the bond was discharged by the judgment of the Court of Appeal in the defendant's favour.

Motion refused, with costs.

The plaintiff then appealed from the order of the Master in Chambers, refusing his motion.

Aylesworth, for the appeal.

George Kerr, Jr., contra.

GALT, J., dismissed the appeal, and affirmed the order of the Master, with costs.

SHEPHERD V. THE CANADIAN PACIFIC RAILWAY
COMPANY.

Award, appeal from—Time—Filing—R. S. O. ch. 50, secs. 191, 192, 193.

In the case of a voluntary *nisi prius* submission to arbitration in which a right of appeal is reserved by consent, the procedure is governed by R. S. O. ch. 50, secs. 191, 192, & 193, and the time for appealing from the award runs from the date of filing.

McEwan v. McLeod, 46 U. C. R. 235, followed.

[December 23, 1886.—*Boyd*, C.]

Upon an appeal by the defendants from an award, the plaintiff raised an objection that it was brought on too late.

A. H. Marsh, for the plaintiff.

George Macdonald, for the defendants.

BOYD, C.—This action was referred to arbitration by consent of the parties, when it was called for trial at Brockville, on 18th May, 1886, and an order of reference was drawn up in the form of the usual *nisi prius* submission. It was therein provided that an appeal should lie against the award to the Court, or to any Judge thereof. The arbitrator made his award of date 22nd Nov., 1886, and it is said it was published on that day. The defendants gave notice of appeal on the 13th December, as to which the preliminary objection is made that it is not in time. This is placed on the ground that no filing of the award is requisite, and that the time to give notice runs from the making of the award. It is said that the award has not been filed in this case. The reference here is a voluntary one under sec. 205 of R. S. O. ch 50, and an appeal is given thereby as under sec. 189. The appeal under sec. 189 is regulated by secs. 191, 192, from which it appears that the report or certificate, the exhibits and evidence, are to be filed, and that the appeal from the report or certificate is to be launched within fourteen days from the filing. That this is the practice was recognized by Osler, J. in *Re Town-*

ship of *York and Willson*, 8 P. R. 313, and more expressly in *McEwan v. McLeod*, 46 U.C.R. 235, where the point was taken as here that the appeal was not in time. The award there was dated 9th May, was filed 25th of August, and notice of appeal was within fourteen days thereafter. The learned Judge held that secs, 191, 192, and 193 regulate the procedure in cases like the present of voluntary submissions at *nisi prius*, in which a right of appeal is reserved by consent. As the award here has not been filed, the appeal is in time, as against this objection, but all the proper documents should be filed before the matter is further prosecuted. Costs of this argument to be to the appellant in any event.

MACGREGOR V. McDONALD ET AL.

Disobeying order—Contempt—Appeal—Staying proceedings.

A party who has been ordered by the Court to attend for further examination after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order. Proceedings under the order will not be stayed pending the appeal.

[December 20, 1886.—*The Master in Chambers*.]

[December 21, 1886.—*Armour, J.*]

THIS was an application on behalf of the plaintiff to set aside the appeal bond filed by the defendant D. Mitchell McDonald, upon his appeal to the Court of Appeal, from an order of Armour, J., sitting in Court, directing that defendant do attend for further examination by the plaintiff in the action.

MacGregor, for the plaintiff.

H. Cassels, for the defendant D. M. McDonald.

THE MASTER IN CHAMBERS.—Motion to strike from the files the security bond on the appeal in this case, on the ground that the appellant is in contempt, and therefore not in a position to bring the appeal.

Whatever view, in its discretion, the Court of Appeal may take, I must regard it that the order of the Common Pleas Division made by the Hon. Mr. Justice Armour, is properly the subject of appeal by the defendant to the Court of Appeal. I am speaking now as to the nature of the order itself, without reference to the peculiar position of the defendant, as being in contempt.

But he is in contempt, and that not of a mere formal nature, but from conduct deliberate and intended. It is necessary therefore to see if that must prevent his bringing this appeal.

I have looked at a good many cases referred to, and I think the true spirit of the law on this point is stated in *Daniell* 5th ed., 428, 430, 431.

“The rule that a party in contempt cannot move till he has cleared his contempt, is, in practice, confined to cases where such party comes forward voluntarily; a plaintiff in contempt is, therefore, entitled to prosecute his suit, and to make use of the powers of the Court for that purpose, and similarly a defendant in contempt is entitled to take any measures necessary for his defence; he is, therefore, entitled to production of documents,” (p. 428,) and again, (p. 430, 431): “And in general wherever a party in contempt is entitled to be heard, there exists a right of appeal, and application may be made with immediate reference to the motion upon which he is so privileged to be heard, or for the purpose of obtaining evidence in support of it.”

This appeal is, I think, within the law so stated, and it is fully supported by the many authorities referred to.

I must, therefore, dismiss this motion.

A cross-application was made at the same time on behalf of the defendant D. Mitchell McDonald to stay proceedings under the order of Armour, J., pending the appeal to the Court of Appeal.

H. Cassels, for the motion, argued that unless proceedings were stayed, the appeal would be rendered futile.

MacGregor, contra.

The following cases were referred to, *Conmee v. Canadian Pacific R. W. Co.*, 11 P. R. 356; *Polini v. Gray*, 12 Ch. D. 438; *Wilson v. Church*, 12 Ch. D. 454; *Re Allen*, 31 U. C. R. 484; *Cavendish v. Cavendish*, 15 W. R. 182; *Garstone v. Garstone*, 4 Sw. & Tr. 73; *Attorney-General v. McLaughlin*, 5 P. R. 76; *Gamble v. Howland*, 3 Gr. 303.*

The MASTER IN CHAMBERS, after reserving judgment, refused the motion.

On appeal, argued by the same counsel.

ARMOUR, J., affirmed the refusal.

RE WALSH V. ELLIOTT.

Prohibition—Division Court—Liquidated and unliquidated amounts—49 Vic. ch. 15, sec. 6, (O.)

A claim aggregating more than \$100 and less than \$200, which is made up of two amounts, one liquidated and one unliquidated and both less than \$100, cannot be sued in a Division Court.

Per ARMOUR, J.—The claims could not have been sued together before 49 Vic. ch. 15, sec. 6, (O), and that Act does not expressly or impliedly affect the question.

Per O'CONNOR, J.—But for 49 Vic. ch. 15, sec. 6, (O.), the case would be governed by *Vogt v. Boyle*, 8 P. R. 249. It must be assumed that the legislature intended by that enactment to lay down a rule of combination to regulate the whole subject; and the enactment being silent as to the combination of such claims as are here sued on, they must be taken to be excluded from the jurisdiction.

[November 2, 1886—*Wilson*, C. J.]

[December 23, 1886.—*The Queen's Bench Division*.]

THIS was an application by the defendant for an order for a writ of prohibition, directed to the Judge of the 5th

*See also *Emerson v. Ind*, 55 L. J. Ch. 903.—*Rep*.

Division Court of the county of Oxford, restraining him from hearing this plaint, upon the ground that the amount claimed by the plaintiff was beyond the jurisdiction of a Division Court.

The amount claimed was \$114 ; \$75 upon a promissory note and \$39 upon a bill of costs, of which the amount was not ascertained by any act of defendant's.

J. B. Clarke, for the motion. The Division Courts have jurisdiction up to \$200, where the amount is liquidated, and in actions of contract up to \$100 where the amount is unliquidated. Here the amount is partly liquidated and partly unliquidated, and the total is over \$100. This is beyond the jurisdiction of the Court, as defined by 43 Vic. ch. 8, sec. 2 (O.) The whole amount is over \$100, and is not ascertained by the signature of the defendant. There is no authority precisely in point, but reference may be had to the following : *McCracken v. Creswick*, 8 P. R. 501 ; *Meek v. Scobell*, 4 O. R. 553 ; *Wiltsie v. Ward*, 8 A. R. 549 ; *Re Mead v. Creary*, 32 C. P. 1 ; *Kinsey v. Roche*, 8 P. R. 515 ; 49 Vic. ch. 15, sec. 6, (O.).

Shepley, for the plaintiff. The language of sec. 19 of the County Courts Act, R. S. O. ch. 43, is so similar to that of sec. 2 of the Division Courts Act, 1880, 43 Vic. ch. 8 (O.), that the decision in *Vogt v. Boyle*, 8 P. R. 249, is an unanswerable authority in this case ; see also *Jordan v. Marr*, 4 U. C. R. 53, and *McLaughlin v. Schaefer*, 13 A. R. 253, approving *Vogt v. Boyle*.

WILSON, C. J., was inclined to agree with the contention of the defendant, but considered that he was bound by the case of *Vogt v. Boyle*, supra, to hold that the amount claimed in this case was within the jurisdiction of a Division Court.

The defendant appealed from this decision to the Queen's Bench Divisional Court, before which the same counsel appeared.

ARMOUR, J.—I do not think that both the claims sued for in this case could have been sued together before the passing of the Act 49 Vic. ch. 15 (O.)

If they could have been so sued before the passing of that Act, I think that they can be so sued still, for I do not think that the Act 49 Vic. ch. 15 (O.) either expressly or impliedly affects the question; it certainly does not do so expressly, and I do not think that we can properly imply from an Act passed for extending the jurisdiction of the Division Courts, a contraction of their jurisdiction in a respect as to which it says nothing.

I think that the plaintiff should be at liberty to withdraw one of the claims and bring another suit for it, and continue the present suit as to the other, and that unless he consents to do this prohibition should go.

I refer to *McLaughlin v. Schaefer*, 13 A. R. 253; *Fitzsimmons v. McIntyre*, 5 P. R. 119; *Walsh v. Ionides*, 1 E. & B. 383; *Kerkin v. Kerkin*, 3 E. & B. 399.

O'CONNOR, J.—This was an appeal from an order of Wilson, C.J., made on the 2nd day of November, 1886, discharging a summons for an order for prohibition, directed to the Judge of the County Court of the county of Oxford and to the plaintiff, prohibiting them from further proceeding in a plaint against the defendant and another, executors, in the 5th Division Court of the said county of Oxford. The order for prohibition was asked on the ground that the plaint was beyond the jurisdiction of the Division Court. It was to recover \$71 on a promissory note made by the testator of the defendants, amount of notarial \$1.28; together with \$39.09, amount of a solicitor's bill in an action in the Chancery Division of the High Court of Justice; and interest \$3.63; amounting in all to \$115. The objection was that the jurisdiction is in such a case limited to \$100.

By section 54, ch. 47, R. S. O., as amended by 43 Vic. ch. 8, sec. 3, (O.) the Judge of every Division Court may hold plea of: (1) All personal actions where the

amount claimed does not exceed \$60 ; and, (2) All claims for debt or for any sum payable under or upon any contract for the payment of money, or for payment in labor or in any kind of goods or commodities, or in any other manner than money, where the amount or balance claimed does not exceed \$100.

To these two classes of claims was added a third by the last mentioned Act, 43 Vic. ch. 8, sec. 2, as follows: “(3) All claims for the recovery of a debt or money demand the amount or balance of which does not exceed \$200, and the amount or the original amount of the claim is ascertained by the signature of the defendant or of the person whom as executor or administrator, the defendant represents.”

But the said sec. 54 of the original Act, ch. 47, R. S. O., is further amended, by sec. 6 of the Act 49 Vic. ch. 15 (O.) “by adding the following subsection thereto ; (4) claims combining.

(a) A cause of action in respect of which the jurisdiction of the Division Courts, by the foregoing sub-sections of this section limited to \$60, which causes of action are hereinafter designated as class (a) and

(b) A cause of action in respect of which the jurisdiction of the said Courts is by said sub-section limited to \$100, which causes of action are hereinafter designated as class (b), may be tried and disposed of in one action and the said Courts shall have jurisdiction so as to try the same ; provided, firstly, that the whole amount claimed in any such action in respect of class (a) shall not exceed \$60 ; and that the whole amount claimed in any such action in respect of class (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a) shall not exceed \$100.

(5.) The finding of the Court upon the claims when so joined as aforesaid, shall be separate.”

In the case of *McLaughlin v. Schaefer*, 13 A. R. 253, Mr. Justice Patterson, at p. 266, remarks with reference to the last-mentioned statute (49 Vic. ch. 15.) “The new

Act allows a plaintiff to combine in one action claims of the first and second of these three classes, provided the amount claimed in respect of the first class does not exceed \$60, and that the whole amount claimed in respect of the two classes combined, or in respect of the second class when no claim is made in respect of the first class, shall not exceed \$100. This legislation apparently forbids the application to the Division Courts of the principle of *Vogt v. Boyle* to the extent of allowing a claim ascertained by signature to be joined with a claim not so ascertained if the combined claims exceed \$100, modifying in this respect the effect which would, in accordance with *Vogt v. Boyle*, have probably been given to the Act of 1880, but the principle of that decision will still apply to the jurisdiction of the County Courts."

No doubt, class (b) includes a claim on a promissory note for any amount up to but not exceeding \$100, although the language of the amending clause seems, at first sight, to imply otherwise.

But to interpret according to that seeming implication would lead to obscurity. In this instance there can, I think, be no question, that the note for \$71, and an open account for an amount, which combined would amount to \$100, or less, could be entertained, heard, and determined by the Judge of the Division Court. But I conceive, as Mr. Justice Patterson intimates, that if they amount to more than \$100, the Judge has no jurisdiction. The amendment only provides that classes (a) and (b) may be combined, and limits the amount of the combined claims to \$100. This leaves the third, or undesignated, class to stand alone.

This also keeps the two classes of the original Act practically separate and distinct from the new and added clause "(3)" of the Act 43 Vic. ch. 8, and it is from judgments in this "(3)" class that the appeal is given by subsection 2.

Although the expression of the new class is: "All claims for the recovery, &c., of an amount *not exceeding* \$200, &c.,"

the true and full meaning, derived from reading the provision for the "(3)" class, undoubtedly is; "All claims for the recovery, &c., of an amount, exceeding \$100, but not exceeding \$200;" for the only difference besides the amount, is that the amount in class (b) may or may not be ascertained by the signature, that is in class (b) the signature is not essential; in the third or new class it is essential to the jurisdiction,

The amendment of 43 Vic. ch. 8 increased the jurisdiction of the Court from \$100 to \$200 in respect of claims founded on contract, attaching to that increase the condition that the amount or original amount should be ascertained by the signature of the party, &c.; and this formed a third class of claims. Then as the law stood, the principle of *Vogt v. Boyle*, would probably be followed, as to combination of different classes of claims. But then follows the amendment, 49 Vic. ch. 15 (1886), which distinctly enunciates a rule of combination inconsistent with the principle posited in *Vogt v. Boyle*. I think it must be presumed that the Legislature was cognizant of the law as it was interpreted by the Courts, and in passing an Act, not, indeed, contradictory of, but inconsistent with and contrary to the law as interpreted by the Courts, that it intended to lay down a rule of combination, which was to regulate the whole subject; a rule which, as regards the Division Court, was to be instead of the rule in *Vogt v. Boyle*.

The rule of the statute is, that two clearly designated classes of the three severally distinct classes recognized may, and only those two classes may, be combined, leaving the third class untouched. It appears, therefore, and from the nature of the matter, a case whereto the maxim *expressio unius est exclusio alterius*, is clearly applicable.

The notion, then, of combining either class (a) or class (b) with the third class, is excluded. This third class is also distinguished by the fact that the right of appeal is given from and confined to adjudication in cases of that class; and this is in itself significant, for if either of the

other two classes could be combined with the third, the right of appeal might indirectly be extended to them.

In my opinion then, the appeal should be allowed, the order of the learned Chief Justice be rescinded, and the summons granted for an order for the prohibition mentioned in the notice of motion herein be made absolute for the said order, with costs.

TOMLINSON ET AL. V. THE NORTHERN RAILWAY COMPANY
OF CANADA ET AL.

Costs—Third party—Appeal—Discretion—Sec. 32, O. J. A.

Held, that the order of ARMOUR, J., *ante* p. 419, refusing the third parties their costs, was made in the exercise of a discretion, which by sec. 32, O. J. A., was not subject to review without leave, and, as no such leave had been given, an appeal from the order was dismissed with costs.

The Court directed that such part of the costs incurred by the third parties in establishing the defence as might properly have been incurred by the defendants, should be allowed by the taxing officer.

[December 24, 1886.—*The Common Pleas Division.*]

THIS was an appeal from an order of Armour, J., refusing to give the third parties, the Canada Lake Superior Transit Company, costs either against the plaintiffs or the defendants.

The facts sufficiently appear in the report of the judgment, 11 P. R. 419.

Tilt, Q. C., for the third parties.

Boulton, Q. C., for the defendants.

W. H. P. Clement, for the plaintiffs.

ROSE, J.—I have given the matter most careful consideration, as I am dissatisfied with the result.

I find third parties who are not liable to the plaintiffs at all, compelled to take part in litigation at the instance of the defendants, because if the defendants had been liable, they would have had the right to look to the third parties for indemnity.

If the third parties had not appeared and looked after the defence, it might have been that through some negligence, or inadvertence, on the part of the defendants, judgment would have been obtained against the defendants ; and then the third parties would have had to pay a claim which the defendants were not in fact liable to pay, and which therefore the third parties had not undertaken to pay, or to indemnify the defendants against.

As a matter of fact we learn that the third parties practically undertook the defence, brought down the witnesses, and disclosed such facts as prevented the plaintiffs' recovery, and now, according to the order as it stands, have to pay their own costs.

I quite agree the plaintiffs should not pay such costs, for the reasons given by Mr. Justice Armour, but were the judgment open to review, I am not sure I could agree that the defendants should not pay them.

It is not necessary I should express any opinion on that point, as I think that by reason of the provision of section 32, O. J. A., we have no power to review the order.

Under that section no order as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making the order, and no such leave was here obtained.

I think the costs reserved by the order were within the discretion of the learned Judge, and hence the order is not appealable. See *Hornby v. Cardwell*, 8 Q. B. D. 329 ; *Wansley v. Smallwood*, 11 A. R. 439, especially at p. 449, where Osler, J. A., states the rule as to an appeal on the question of costs to be : " That if in making the order complained of there has been any violation of principle, or the Court has proceeded on a wrong general rule, or if the discretion of the Court has been exercised on any

misapprehension of fact, the Court of Appeal will interfere, but not otherwise," and cites a number of authorities.

I do not see how we can interfere on any of these grounds.

As I understand the learned Judge he was of the opinion in this case that it was the duty of the third parties, as well as of the defendants, to have seen that only one set of costs was incurred, and possibly that such arrangement should have been entered into at the time of making the order in Chambers, and on the facts of this case he did not think the defendants had been guilty of any act which enabled him to direct them to pay the third parties' costs.

That was an exercise of his discretion, and we cannot review it.

It may be that where the defendant applies in Chambers for an order under Rule 111, the learned Master may impose as a term or condition that the defendant and third party shall elect to have the defence conducted by the same solicitor and counsel, and that the party declining shall pay the extra costs occasioned by his separate defence.

I have tried to formulate some rule of general application, but after much consideration am unable to do so. The difficulties arising from many possible complications seem to be very numerous and weighty, and their solution must be left to the best discretion exercisable in each case keeping in mind that as a general rule the plaintiff's burden of costs is not to be increased by bringing in third parties.

I think the appeal must be dismissed with costs to the plaintiffs, but without costs to the defendants.

Such costs as have been incurred by the third parties in establishing the defence which might properly have been incurred by the defendants, should be allowed by the taxing officer as costs in the cause.

Whether one or two counsel fees should be allowed must be determined on the usual grounds.

CAMERON, C.J., and GALT, J., concurred.

Appeal dismissed.

STEWART V. SULLIVAN.

Staying proceedings—Interlocutory costs—Default—Practice in equity and at common law.

In equity, if interlocutory costs payable by the plaintiff remained unpaid, the Court might, but was not bound to, stay proceedings, and would not if it were not equitable to do so.

At common law, while non-payment of such costs was not a ground for staying proceedings, yet if it appeared equitable to stay proceedings until they were paid, the court in the exercise of its inherent jurisdiction might direct a stay.

The common law practice is the more convenient one, and should now be followed.

And where the plaintiff served in succession four notices of trial for the same Assizes, all of which were set aside as irregular, with costs against him, and he was in default for non-payment of such costs, the action was stayed until they should be paid.

[December 24, 1886.—*The Common Pleas Division.*]

AN appeal by the plaintiff from an order of Armour, J., staying proceedings till the plaintiff should pay certain interlocutory costs.

The facts and authorities appear in the judgment.

Aylesworth, for the plaintiff.

McIntyre, Q. C., for the defendant.

ROSE, J.—The plaintiff, a medical gentleman, brings this action—in person—against a brother professional, both residing in Kingston.

The writ of summons was issued on the 10th of February, 1886, statement of claim delivered on the 27th of February, defence and counter-claim on the 9th of March, issue joined by the plaintiff on the 10th, and notice of trial served on the 11th for the sittings to be holden on the 22nd of March.

On the 12th of March a summons was taken out on the defendant's behalf to set aside the notice of trial on the ground that it was served before the pleadings were closed.

This ground was untenable according to the decision in *Hare v. Cawthrope*, 11 P. R. 353, but the order was not moved against.

The summons was served on the plaintiff on the 12th.

On the same day he served a further notice of trial for the same sittings, and a further summons was taken out on the 13th to set it aside on the same ground as in the first summons.

The second summons was served on the 13th, and within about half an hour thereafter a third notice of trial was served by the plaintiff for the same sittings.

The two summonses were returnable on the 16th, and on that day the notices served on the 11th and 12th, "and all notices of trial served before the pleadings herein were closed," were set aside "for irregularity in that the same were given prematurely, with costs to be paid by the plaintiff to the defendant."

On the 15th of March the case was entered for trial by the plaintiff.

The above order setting aside the notices of trial was served on the 16th at 3 o'clock P.M., and on the same day about 3:30 P.M. the plaintiff served a further notice of trial for the same sittings.

On the 19th of March a summons was granted by the learned local Judge, returnable before the presiding Judge at the sittings of the court for trials on the 22nd to shew cause why the notice of trial served on the 16th should not be set aside, on the ground of irregularity in that the same was served too late, and that the entry of the action be struck out on the ground of irregularity in that the same was entered before the pleadings were closed, and without any regular notice of trial having been given.

This summons was on the 22nd of March made absolute by the trial Judge, the learned Chief Justice of this Division, "with costs to be paid by the plaintiff to the defendant."

On the 28th of September the plaintiff gave notice of trial for the sittings to be holden on the 12th of October.

On the 1st of October the costs were taxed under an appointment dated 30th September, those under the first order at \$31.60 and under the second at \$25.80.

On the 1st of October the plaintiff left with the taxing officer a notice, as follows :

“ To John Fraser, Esq.,

Deputy Clerk of the Crown and Pleas

at Kingston.

SIR,—There was left at my house at noon to-day an “appointment” to tax at 10 o’clock to-morrow forenoon two bills of costs in this cause under orders said to be dated the 16th and 23rd of March, 1886, respectively. As this action has not been tried, and cannot be tried till the Fall Assizes, I do not see how there can be a bill of costs to tax on either side. I therefore object to any bill of costs whatever being taxed. Especially do I object, as there cannot be a doubt on the mind of the defendant that the bill of costs in this action will have to be taxed against the defendant himself eventually.

“ 30th September.”

“ JOHN STEWART.”

The plaintiff says that having attended and read the above to the Clerk he left the office, and did not return for a couple of hours, meaning, as I understand him, that he did not attend on the taxation.

On the 5th of October a formal demand of payment was served on the plaintiff, requiring payment of both sums.

On the 9th of October, the costs not having been paid, a summons was granted by the learned Local Judge, returnable before the presiding Judge at the ensuing sittings on the 12th, calling on the plaintiff to shew cause why all proceedings in the action should not be stayed on the ground of the non-payment of the costs, and on the 12th the summons was made absolute on such ground.

Against such order the plaintiff appeals, on the ground that it was not warranted by the practice of the Court.

It was stated that the learned Judge, Armour, J., acted on the authority of the cases of *In re Youngs*, *Doggett v. Revett*, 31 Ch. D. 239, and *In re Neal*, *Weston v. Neal*, same vol. 437.

Mr. Aylesworth contended that no such rule was known to the common law courts, citing *Morton v. Palmer*, 9 Q. B. D. 89; that no such rule existed in this Province, even in the courts of equity, and that if such rule were found to exist as a rule in the court of equity, it was not a convenient practice and should not be adopted.

In the case of *Friendly v. Carter*, 9 P. R., at p. 46, Osler, J., states the rule to be "that where there was a conflict between the practice of equity and the common law practice in reference to the same matter, that practice which appears on the whole to be the most convenient shall be followed."

I have carefully examined the cases above referred to in the courts in England and the cases there cited.

The practice probably most clearly appears from the case of *Wilson v. Bates*, 3 My. & Cr. 197, which is cited in all the above cases.

In that case the plaintiff having refused to pay certain interlocutory costs, an attachment was issued against him, and he was placed in the custody of the sheriff.

While in custody he sued out an attachment against the defendants for want of an answer, and the defendants were arrested, and entered into bail bonds.

The V. C., Sir Lancelot Shadwell, having refused to set aside the attachments against the defendants for irregularity, an appeal was taken to the Lord Chancellor, Cottenham.

He refused to interfere, and stated that the plaintiff might proceed, though in contempt, until the Court upon a motion for that purpose, made an order staying proceedings until the plaintiff paid the prior costs.

The judgment considers the 78th ordinance of Lord Bacon, by which it is declared that "they that are in contempt, especially so far as proclamation of rebellion, are

not to be here, neither in that suit, nor any other, except the Court of special grace suspend the contempt."

The judgment is interesting, and apparently settled the practice at that date.

In a foot-note, p. 204, it is stated that in a case of *Bickford v. Skewes*, 10 Sim. 193, "where the plaintiff was under an order to try his right in an action at law within a specific period, and after the making of the order the defendant came into contempt for the non-payment of costs, the plaintiff's motion to defer the trial until the defendant had cleared his contempt was refused, but without costs."

In *Wilson v. Bates* the Lord Chancellor stated that he had "no disposition whatever to extend the practice of the Court in the construction of Lord Bacon's ordinance beyond what," he found, "to be established," and from *Bickford v. Skewes* and other cases it would appear that the practice was much modified.

The practice set out in *Wilson v. Bates* was stated by Pearson, J., in *Re Youngs* not to have been shewn to have been altered in any way by any new statute or order, and was followed.

In *Re Neal* Bacon, V. C., said, 31 Ch. D. at p. 439: "I find the practice is established by the older authorities, and a recent case has been cited to me, *In re Youngs*, in which Mr. Justice Pearson has followed those authorities." And he gave effect to a preliminary objection that the plaintiff was in contempt for not having complied with the order for payment of costs, and would not allow the plaintiff to proceed until the costs were settled.

It was objected by the plaintiff's counsel that there was no instance of such an objection being raised at the hearing or trial of an action, and that in the cases cited applications to stay proceedings had been made before trial, but this objection apparently did not have weight with the learned Judge.

It was quite a usual practice in equity for a party to be prevented from renewing a motion which had once failed

until he had satisfied the costs of the abortive motion. See *Harvie v. Ferguson*, 1 Ch. Chamb. R. 218, where the late Chancellor VanKoughnet said: "It has always been held that before an application is made the costs of a former one as to the same matter should be first paid."

In *Taylor v. Hall*, 29 Gr. 101, Mr. Justice Ferguson refused to give effect to an objection that the then motion could not succeed because the costs of a former motion had not been paid, and based his refusal on the ground that the costs had not been taxed.

He, however, seemed to acknowledge the existence of the rule, although holding that it did not strictly apply to the facts before him.

I have been unable to find, and have not been referred to any reported decision in equity in this Province staying proceedings in the suit generally on the sole ground that costs of interlocutory proceedings had not been paid.

It would appear from the later cases in England that the abolishing of the practice permitting the issue of an attachment for non-payment of costs had no effect upon the practice of staying proceedings.

It seems clear, therefore, that the order made herein was quite in accordance with the practice of the Chancery Divisional Court in England.

At common law I have been unable to find any rule authorizing the staying of proceedings on the ground simply of interlocutory costs being unpaid, and have concluded that none such ever existed.

As long ago as Hilary Term, 11 Geo. III, 1771, in *Melchart v. Halfey*, 3 Wilson 149, proceedings were stayed in an action upon the case upon a contract, which formed the subject matter of a preceding action on the case, in which the plaintiff was non-suited upon the merits, and in which action a new trial had been refused.

In addition to bringing a second action at law the plaintiffs also filed a bill in Chancery.

In delivering judgment Lord Chief Justice De Grey said (p. 153) the rule ought to be made absolute "for this reason only (viz.) because the present action is vexatious."

In 1813 in the case of *Wild v. Hobson*, 2 Ves. & Beames 105, the Lord Chancellor said (p.108) that "upon looking into the history of courts of law with reference to applications to stay pending proceedings, until the costs of former proceedings have been discharged, not dismissing the second action, but merely staying it until justice shall be done to the defendant in the former action, by paying those costs which the law has imposed on the plaintiff, it appears to have been originally very much confined to the action of ejectment; and it may be laid down generally, that in an action, so much a creature of their own formation, it is not unfair, as a general rule, that the second action should be stayed, if the costs of the former action are not paid: not universally; as in many instances, though the same question, that arose in the second cause, must be capable of being tried in the first, it might not be the fault of the party, that he did not bring it on. This was afterwards extended to the action for mesne profits; but so lately as the time of Lord Chief Justice De Grey, *Melchart v. Halfey*, 3 Wils. 149, there was considerable doubt, whether a court of law would apply that principle, represented as one of general application both at law and in equity, to any other action than those two. The opinion of the Court, as it is expressed, seems to extend to actions of quite a different nature, upon contract: but they very cautiously went no further than staying the proceedings, expressly on the ground, that they were satisfied that the second action was vexatious * * . That case is also an authority in another respect for this application; that one court will in certain proceedings stay a second action, though the first was in another Court."

I have made the above full extract as no doubt it correctly gives us the history of the practice of the courts of law to that date.

I have, however, found cases where the courts of law have refused to stay proceedings until payment of interlocutory costs. See Arch. Pr., 12th ed., p. 1495, note (u)

In *Eagar v. Cutthill*, 6 Dowl. 125 (1837), a rule *nisi* had been obtained for the costs of the day for not proceeding to trial pursuant to notice, and "why all proceedings should not be stayed until after the payment of those costs." Parke, B., in giving judgment, said: "It is not the practice to incorporate a stay of proceedings in a rule for the costs of the day, and there is no reason for departing from the ordinary course. The rule must be absolute as to the other part, *and discharged as to the remainder, with costs.*"

In *Shoredicke v. Gilbard*, 8 Dowl. 296 (1840), there were *two defaults* by the plaintiff in proceeding to trial. It was proposed that the payment of the costs of these two defaults should be made a condition precedent to the plaintiff being allowed to take his cause down to trial. Littledale, J., said: "I cannot do that in a direct application of this kind. You may compel the plaintiff to proceed. If he requires any indulgence, then I may make the payment of these costs a condition on granting it; but I cannot make it a direct ground of application. The defendant has his remedy by attachment."

In *Aime v. Chinnoek*, 8 Dowl. 736, upon the cause being called on for trial, the record was withdrawn in consequence of the plaintiff not being prepared to try. The affidavit in support of the application stated that it would be difficult for the defendant to bring his witnesses together again, one of whom lived in Cheshire; that the action was for an alleged trespass in turning the plaintiff out of his house; that he would have been indicted for keeping a disorderly house if he had not left it; that from the plaintiff's condition the defendant had no chance of obtaining his costs; and that the alleged cause of action was unfounded. Parke, B.: "The rule may be made absolute without a stay of proceedings. You may have an attachment for non-payment of costs. That is your remedy."

Morton v. Palmer, 9 Q. B. D. 89, is in strict accordance with the above cases. The head-note is: "The plaintiff obtained a verdict in an action, and the Queen's Bench Division having refused to grant a rule *nisi* for a new

trial, the defendant obtained a rule absolute in the Court of Appeal. By the rule the plaintiff was ordered to pay the costs of the applications, which he failed to do. *Held*, by Matthew and Cave, JJ., that the defendant was not entitled to an order to stay the proceedings until the costs were paid."

Cave, J., at p. 91, refused to accede to the argument that the defendant was entitled to such stay as a matter of right. He said: "It is to my mind entirely contrary to justice that, without being at liberty to exercise any discretion whatever in the matter, the Courts should be compelled to say that a man who may have a just claim should be prevented from pursuing it further because he may be unable to pay the costs of some interlocutory proceeding in which he may have failed perhaps from no fault of his own. Mr. Harrison says that this right has been recognized and acted upon in the Court of Chancery. But, on looking at the cases he has referred to, I cannot find that any such rule has ever been laid down or even suggested."

By this latter observation I understand the learned Judge to mean that no rigid rule excluding discretion had been laid down.

In 1848 Macaulay, J., in *Bays v. Ruttan*, 1 C. L. Chamb. R. 20, discharged a summons to stay proceedings until the costs of a former suit were paid, the plaintiff having been non-suited on a technical ground.

The learned Judge said: "The cases shew that in the Common Pleas" (in England) "it is not usual to stay proceedings in an action till payment of the costs of former actions, unless the merits have been tried; while in the Queen's Bench it is usual, if the second action appears to be vexatious, which is the test here."

In *Doolan v. Martin*, 6 P. R. 319, Harrison, C. J., reviews a large number of cases as to staying the action until the costs of a former action are paid. He set aside an order made in Chambers on the facts of the case, and stated the jurisdiction was one which should be sparingly exercised in any case.

In the same vol., p. 65, is a very interesting judgment of Mr. Dalton, Q. C., the learned Master in Chambers, in *Nicholson v. Coulson*, where he held (1) That 29 & 30 Vic. ch. 42, sec. 1, does not refer to costs of the day in the same suit, and consequently proceedings cannot be stayed in a suit in which costs of the day have not been paid. (2) That nevertheless this can be done on the ground of abuse of the process of the Court, where the proceedings are vexatious; and on the facts of that case he stayed proceedings until payment of the costs of the day, the plaintiff having failed to appear at the trial.

The learned Master relied upon the opinion of Alderson, B., in *Cocker v. Tempest*, 7 M. & W. 502-3, in which he said: "The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior," &c.

In *Becket v. Durand*, 6 U. C. L. J. (O. S.) 15, Draper, C. J., said: "I find no authority for staying proceedings until the costs of the day are paid, *though an extreme case* might arise in which such a course would be proper," referring to *Henzell v. Hocking*, 9 Jur. 181.

It would thus seem that at common law mere non-payment of interlocutory costs in the same suit is not of itself a ground for staying proceedings, but that if the proceedings seem vexatious, or to use the words of Alderson, B., in the case above referred to, "if it be made out that the process of the Court is used against good faith, the Court ought to interfere to prevent it for the purpose of administering justice."

MacLennan's J. A., 2nd ed., p. 534, may be referred to as to cases where security for costs will be ordered.

Sec. 16, sub-sec. 6, O. J. A., after stating that no proceedings in the High Court, or before the Court of Appeal, shall be restrained by prohibition or injunction, proceeds: "Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit * * *."

The result seems to me to be that in equity, if interlocutory costs remained unpaid, the Courts might, but were not bound to, stay proceedings, and would not if it were inequitable to do so.

At common law, while non-payment of such costs was not a ground for staying proceedings, yet if it appeared equitable to stay proceedings until they were paid, the Court, in the exercise of its inherent jurisdiction, might direct a stay.

If there is any substantial distinction between the two, it is that the courts of equity threw the onus on the plaintiff to shew why the proceedings should not be stayed, while the courts of law threw the onus on the defendant to shew why they should be stayed.

It seems to me the latter is the more convenient practice, and should be adopted.

In this case, therefore, we have to consider did such facts appear as warranted a stay?

The order puts the stay simply on the ground of non-payment of prior costs. This alone, for the reasons above stated, I think not sufficient, but were the facts that appeared such as called for the interference of the Court?

If a solicitor had acted as the plaintiff did, I am of the opinion the Court would have felt bound in some way to punish him for misconduct.

Unless the plaintiff can plead ignorance of law, and the practice of the Courts, as an excuse, his conduct was equally improper, and it seems to me the rules should not be relaxed to enable parties to conduct their own causes through the Courts to the vexation of their opponents, and hindering and delaying the proceedings of the Courts.

If the plaintiff assume to conduct the proceedings, he must not complain if he is dealt with as knowing how to conduct them with propriety.

The facts of this case will probably never appear in another action, and each case must, I think, be determined on its own peculiar facts.

I am unable to say that the exercise of discretion by the learned Judge was an improper exercise or that it calls for our interference.

I think the appeal fails, and must be dismissed, with costs.

CAMERON, C. J., and GALT, J., concurred.

Appeal dismissed, with costs.

GORDON V. PHILLIPS.

Discovery—Information for purpose of pleading—Rule 285, O. J. A.—Discretion.

Where the plaintiff had a good cause of action against the defendant, but was unable to frame his statement of claim unless he could examine the defendant and his employer, who was not a party to the suit,
Held, that he was entitled to such discovery under Rule 285, O. J. A., and that an order for such examination by a local Judge of the High Court had been properly made.

[December 23, 1886.—*The Queen's Bench Division.*]

ON the 12th of June, 1886, the plaintiff obtained a summons from the local Judge of the High Court of Northumberland and Durham, calling upon the respondent and J. L. Brodie, Esq., to shew cause why they should not attend before the local Registrar of this Court at Cobourg, and be examined *vivâ voce* upon oath or affirmation touching their knowledge of the matters in question herein, of all communications written or verbal between the defendant and the said J. L. Brodie, Esq., or between the defendant and any other officer of the Standard Bank of Canada, concerning the plaintiff; and why the said defendant and J. L. Brodie, Esq., should not produce upon their said examination all books, letters, or other documents

containing any communication concerning or in reference to the plaintiff; or why such other order should not be made as the merits of the case might require.

The summons was granted upon the affidavit of the plaintiff that this action was commenced on the 22nd of January, 1886, and that the defendant appeared thereto on 17th May, 1886: that the writ of summons was endorsed with a claim for damages for libel and slander: that the facts upon which he founded his action and claim were as follows: In the latter part of the summer or the early part of the autumn of the year 1883 the directors of the Standard Bank of Canada established a branch or agency of their bank at the village of Brighton, and appointed the defendant the manager thereof, and he continued in the management of the said branch or agency until the month of March, 1885. Since the early part of the year 1879 he, the plaintiff, had been continuously and was still practising his profession as a barrister, solicitor, and notary public at the said village of Brighton: that upon the establishment of the said branch or agency of the said Standard Bank of Canada at Brighton, the defendant was directed by the authorities of the said bank to employ him, and him alone, to do the necessary legal work of the said branch or agency, including that of protesting bills and notes of the bank as a notary public: that the defendant did, pursuant to his instructions, employ him to do the said legal work, and paid him therefor, and continued to do so until on or about the 1st January, 1885, when, contrary to and in disobedience of his instructions, he gave a large portion of said legal work, including the protesting of bills and notes, to another solicitor and notary public, namely, one Wilmot Richard Squier: that the reason for the defendant so taking said work and employment from him and giving it to said Squier was, as he had good reason to believe and verily did believe, because said Squier, on or about said 1st of January, 1885, became the tenant of property belonging to the defendant's wife, and her solicitor, and also because said Squier, as he had reason to believe

and did believe, gave or promised to give the defendant or his said wife some pecuniary recompense for so placing said work in his hands : that the cashier at the head office of the said Standard Bank of Canada, during the time the defendant was agent thereof at Brighton, was J. L. Brodie of the city of Toronto, and the said J. L. Brodie was the defendant's superior officer and was entitled to give the defendant directions and control the defendant's actions as an officer of the said bank : that he was informed and believed that the said J. L. Brodie, having learned that the defendant had, contrary to his instructions, employed said Squier to do the legal work of the said Brighton agency, or part thereof, wrote to the defendant between 1st January, 1885, and 31st March, 1885, enquiring why he, the defendant, had employed said Squier, and that the defendant in reply to said enquiry wrote to the said Brodie a letter or letters in which he, the defendant, excused himself for his having disobeyed his instructions on the alleged ground that he, the plaintiff, the solicitor and notary acting for the said agency, had been guilty of negligence in failing and neglecting to protest certain commercial paper which he, the defendant, had placed in his hands for protest, and that thereby the said bank had come very near suffering serious loss : that the said statement so made by the defendant to the said Brodie was utterly false and untrue, and was made, as he verily believed, with the corrupt and malicious intent and design not only of excusing himself, the defendant, at the plaintiff's expense for his own disobedience of instructions, but also with the corrupt and malicious intent and design of inducing a permanent and complete transfer of the legal business of the said Brighton agency of said bank from the plaintiff to the said Squier : that he had reason to believe and did verily believe that the defendant verbally repeated said defamatory statements concerning him to officials of the said bank : that in consequence of said false, malicious, and injurious statements of the defendant made concerning him, the directors of the said bank, in or about the month of March, 1885,

directed the then manager of the said branch or agency at Brighton to employ said Squier to do the legal work of said agency, and he, the plaintiff, was thus deprived thereof completely and permanently : that he had suffered very great pecuniary loss and damage through the said defamatory statements of the defendant : that he was utterly unable to frame or prepare his statement of claim herein until he could gain information from an examination upon oath of the defendant and said J. L. Brodie, and from a production and inspection of the correspondence between the said parties containing said defamatory statements and leading up thereto : that the defendant and the said J. L. Brodie were still in the employment of the said Standard Bank of Canada, and resided in the city of Toronto.

Upon the return of the said summons the local Judge made the same absolute, and made an order in terms of the summons.

On the 29th June, 1886, the defendant appealed from the said order to the presiding Judge in Chambers, and Galt, J., set the said order aside.

On the 22nd of November, 1886, *Osler*, Q. C., moved by way of appeal from the order made in this action by Galt, J., of 29th June, 1886, setting aside the order made by the local Judge of this Court at Cobourg on the 19th June, 1886, and for an order reinstating the said order of the said local Judge, on the ground that the said local Judge had jurisdiction to make the said order : that the plaintiff had disclosed a case to warrant the making of the said said order ; and that the same was properly made and ought not to have been set aside ; and upon grounds appearing in the affidavits and papers filed.

A. H. Marsh shewed cause, referring to *Carnegie v. Federal Bank*, 10 P. R. 69.

ARMOUR, J.—According to the plaintiff's affidavit, if it be true, and it is uncontradicted, he has a good cause of action against the defendant, but he is unable to frame his statement of claim without the discovery for which he

asks. It is obvious, therefore, that it is necessary for the purposes of justice that he should have such discovery and rule 285 gives it to him.

It was conceded that the local Judge had jurisdiction to make the order for that purpose, and I think that he properly exercised it under the circumstances of this case.

Fisken v. Chamberlain, 9 P. R. 283, is a clear authority for such an order, and it has been followed in *Boulton v. Blake*, 11 P. R. 196; *Tate v. Globe Printing Co.*, 11 P. R. 253; *Carnegie v. Cox*, 11 P. R. 311; *Murray v. Warner*, 11 P. R. 440. See also *Orpen v. Kerr*, 11 P. R. 128; *Marriott v. Chamberlain*, 17 Q. B. D. 154.

The appeal should, therefore, be allowed, with costs, and the order of my brother Galt rescinded, with costs, and the order of the local Judge reinstated and affirmed.

WILSON, C. J., and O'CONNOR, J., concurred.

Appeal allowed, with costs.

A DIGEST

OF

ALL THE REPORTED PRACTICE CASES

CONTAINED IN THIS VOLUME.

ACCOUNT.

See COMMITTAL—ADMISSIONS.

ACTION.

Dismissing action—Want of prosecution.—If the plaintiff without good excuse neglect to proceed with the action, the Court will not, as of course, on his mere undertaking to speed the action and paying the costs, refuse to dismiss ; but where defendant's solicitor had refused to accept notice of trial a few hours late, an order refusing to dismiss and permitting the plaintiff to proceed was affirmed. *Carter v. Barker*, 1.

See CROSS-ACTIONS—JURY NOTICE, 5—VENUE, 1.

ADMINISTRATION.

Administration order—Judgment, entry of—Execution creditor of legatee—Receiver—Mistake—Action.—A summary order was made for the

administration of the personal estate of M. deceased. The order was not entered as a judgment, as it should have been by rule 583, owing to a mistake of an officer of the Court. The L. and C. L. and A. Co., who were execution creditors of one of the legatees and devisees of M., obtained an order appointing the company receiver of the share of the execution debtor, and served notice of this receivership upon the executors of M., but received no notice of the proceedings under the administration order. The company, however, were informed of the proceedings, and upon an *ex parte* motion procured the administration order to be properly entered as a judgment, and then applied for the carriage of the proceedings under it.

Held, that the status of the company was not that of assignee of the legatee, but only of a chargee or lienholder upon the fund or property to which the legatee was entitled ; and therefore the company would not have been entitled in the first instance to ask *in invitum* for a summary

order to administer; and the slip which was made in not having the order to administer properly entered did not give them any additional right in that respect; but notice of the proceedings should have been given to the company in order that they might be bound by what was done.

A receiver, appointed as the company were here, has a right to assert his claims actively, though he may require in some instances the sanction of the Court; and a contention having been raised as to a forfeiture of the interest of the legatee, leave was given to the company to assert their claim by an action. *Re Morphy, Morphy v. Niven et al.*, 321.

See APPEAL, 12—EXECUTOR, 2.

ADMISSIONS.

Admissions, withdrawal of—Reference—Account.]—A defendant was allowed to attack certain items in an account, which, in the course of a reference, had been admitted to be correct by his former solicitor, since deceased, where the defendant swore that he had not authorized the admissions, and that the items were not properly chargeable against him, and where it was shewn that no report had been made and no change had taken place in the position of the parties by reason of the admissions. *McBean v. McBean et al.*, 429.

See EXAMINATION, 9—MASTER IN ORDINARY, 2.

AFFIDAVIT.

See APPEAL, 5—PROHIBITION, 3.

APPEAL.

1. *Companies' Winding-up Act, 45 Vic. ch. 23 (D.)—Appeal—Extending time for.*]—Cross-applications in respect of the same subject matter were argued together, and both were dismissed by a judgment pronounced on the 26th April, 1885. The question argued was an important one, viz., the *ultra vires* of an Act. Separate orders were taken out dismissing the two applications, and the time for appealing from both orders was extended till the 6th of June, on which day one of the parties gave notice of appeal from the order adverse to him. The other party, who was not desirous of appealing unless his opponent appealed, was advised too late to serve notice within the time limited, and therefore applied after the expiration of the time to have it extended.

Held, that it was a proper case for exercising a discretion in favor of the applicant, and leave to appeal was accordingly granted. *Re Lake Superior Native Copper Co.*, 36.

2. *Taxation — Appeal — Local registrars—Jurisdiction of Master in Chambers — Certificate — Taxing-officer.*]—Appeals from the taxation of costs by local registrars are subject to the eight days' limit prescribed as to appeals from orders of Masters and local Judges, as was held in *Stark v. Fisher*, 11 P. R. 235, but the time for appealing may be enlarged by the Master in Chambers or a Judge.

It is a convenient practice, when any case is made on appeal from taxation as to several items, or on the ground of general exorbitancy, to refer the whole bill to one of the taxing officers at Toronto, as upon a revision. *Quay v. Quay*, 258.

3. *Appeal—Time—Sec. 25, “Supreme and Exchequer Court Act.”*—The thirty days’ time allowed for appealing to the Supreme Court of Canada under sec. 25 of “The Supreme and Exchequer Court Act” commences to run on the issuing of the certificate of the Court of Appeal. *Walmsley v. Griffith et al.*, 147.

4. *Costs—Taxation—Local Registrar—Certificate—Notice of appeal—Counsel fees—Instructions.*—Where no formal certificate of the result of a taxation by a local registrar of the party and party costs was filed, but the bill itself, with a memorandum at the end signed by the registrar shewing the result, was filed in the local office and forwarded to Toronto for the purposes of an appeal, and it was admitted that execution had issued upon such memorandum.

Held, that the appeal should not be barred because no more formal certificate was filed.

Two clear days’ notice of such an appeal is sufficient: *Exchange Bank v. Newell*, 19 C. L. J. 253, distinguished.

A counsel fee of \$5 for each necessary and proper enlargement of a Court motion should be taxed.

Instructions for brief should be allowed, where the brief itself is allowed. *McCallum v. McCallum*, 179.

5. *Appeal—New affidavits—Ex parte order.*—Leave was given to the defendants to read new affidavits upon their appeal from an order obtained *ex parte* by the plaintiff. *Taylor v. The Sisters of Charity of Ottawa*, 496.

6. *Payment out of Court—Appeal to Supreme Court of Canada—Discretion of Court.*—The defendants

succeeded at the trial, in the Divisional Court, and in the Court of Appeal. Pending an appeal by the plaintiffs to the Supreme Court of Canada, the defendants applied for payment out of Court to them of a sum paid in by the plaintiffs, representing the whole subject matter of the litigation.

Held, that the application was in the discretion of the Court; that that discretion should be exercised in the same way as upon an appeal to the Court of Appeal; and that the application should therefore be refused, following *King v. Duncan*, 9 P. R. 61. *Canadian Land and Emigration Co. v. Township of Dysart et al.*, 51.

7. *Award, appeal from—Time—Filing—R. S. O. ch. 50, secs. 191, 192, 193.*—In the case of a voluntary *nisi prius* submission to arbitration in which a right of appeal is reserved by consent, the procedure is governed by R. S. O. ch. 50, secs. 191, 192, and 193, and the time for appealing from the award runs from the date of filing.

McEwan v. McLeod, 46 U. C. R. 235, followed. *Shepherd v. The Canadian Pacific R. W. Co.*, 517.

8. *Appeal from Local Master—Rescinding order—Time—Rule 427, O. J. A.*—An *ex parte* order for the production of documents was made by the Local Master at Belleville on the 17th August, 1885, and an order was made by the same officer on the 9th September, 1885, refusing to rescind his former order. The defendants appealed from the latter order.

Held, that the appeal was, in effect, an appeal from the original order, as the result, if the appeal were successful, would be to rescind that order, and the appeal was therefore dis-

missed as too late under Rule 427, O. J. A. *Jamieson v. Prince Albert Colonization Co.*, 115.

9. *Appeal—Forum—Divisions of High Court.*—Appeals from the Master in Chambers may be brought on for hearing before a Judge of the High Court sitting in chambers without reference to the Division in which the action is commenced. *Laidlaw Manufacturing Co. v. Miller*, 335.

10. *Appeal—Setting down—Dies non.*—An appeal from an order made by a local master, on Saturday the 17th April, was set down to be heard on Monday the 26th of April, which was Easter Monday, a *dies non*. The appeal was put on the paper for the following Monday.

Held, that this course was proper and convenient, and also that the proper mode of objecting to the appeal was by a motion to strike it off the list. *McCaw v. Ponton*, 328.

11. *Divisional Court—Appeal to—Time—Rules 522 and 523, O. J. A.*—The judgment at the trial was pronounced on the 19th June, 1885, but was not drawn up and settled till the 11th September. The sittings of the Chancery Divisional Court (to which the defendant wished to appeal) began on the 3rd September.

Held, that the time for appealing under Rule 523, began to run from the 19th June, and that it was not extended by the neglect to draw up the judgment, although, as the judgment was not drawn up, the cause could not be set down under Rule 522.

But, as there was a *bonâ fide* intention to appeal, instructions had been given, the defendant lived abroad, in Texas, the judgment was complex, and there were only twelve

days exclusive of vacation during which it could have been settled, leave to set the cause down was granted on payment of costs. *Hickey v. Stover*, 88.

12. *Costs—Appeal—Administrator—Creditors—Rule 544, O. J. A.*—Costs of appeals are not carried by the words “costs of suit as between solicitor and client,” but require to be specially mentioned in the order for taxation.

The administrator is a necessary party to an administration suit, and as such, should get his general bill of costs incurred in the ordinary proceedings in which he took part: but where an estate is insolvent, the creditors are the persons really interested in the litigation, and it is for them and not for the administrator, to take active steps by way of appeal to reduce the claims of secured creditors. The administrator is entitled to attend upon such appeals, and to tax a watching brief, but not such costs as if he were the principal litigant.

An appeal lies to a Judge in Chambers from the decision of the Master in Chambers, under Rule 544, O. J. A., upon appeal from a pending taxation. *Re Monteith—Merchants Bank v. Monteith*, 361.

See APPEAL BOND—CONTEMPT OF COURT, 3—COSTS, 1, 17, 21—EXECUTOR, 1—INFANT, 4—INTERPLEADER, 4—JUDGMENT, 6—NOTICE OF APPEAL—TRIAL, 1.

APPEAL BOND.

Appeal bond, liability on after appeal allowed—Further appeal pending—Motion, notice of.—A judgment by the Court of Appeal in

favour of a defendant appellant puts an end to all liability upon the appeal bond, which may after such judgment be delivered up to the appellant, even where the other party has given notice of appeal to the Supreme Court of Canada.

Notice should be given to the opposite party of a motion to take the appeal bond off the files. *Burgess v. Conway*, 514.

APPEARANCE.

Defence—Jurisdiction—Service—Appearance.]—The defendants appeared to the writ of summons, and set up in their statement of defence that the High Court of Justice had no jurisdiction; that the cause of action arose in Winnipeg, the defendants' head office was at Montreal, and the service of process was on their agent for local purposes at London.

Held, that there was nothing in these facts to shew want of jurisdiction; and that the appearance had precluded all question as to the sufficiency of the service. *Dart v. Citizens Ins. Co.*, 513.

See LIMITED DEFENCE—WRIT OF CAPIAS.

ARBITRATOR.

See RAILWAY, 3.

ARREST.

1. *Arrest—Ca. sa.—Discharge—Powers of local Judge—Rule 420, O. J. A.*]—A local Judge of the High Court has no power to order the discharge of a defendant held in custody

under a *ca. sa.* issued out of the High Court of Justice. *Cochrane Manufacturing Co. v. Lamon*, 351.

2. *Mitigation of damages—Action for malicious arrest—Pleading and evidence—R. 128, O. J. A.*]—In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour; that the plaintiff was avoiding arrest; that the defendants therefore watched him and when he endeavored to escape detained him until the arrival of the constable, and then gave him into custody; and that the defendants did this in the *bonâ fide* belief that they were justified in thus aiding the arrest.

Held, that although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear upon the record. *Fursley v. Bennett et al.*, 64.

3. *Rescinding order for ca. sa.—Jurisdiction of Judge who made the order—Discharging defendant.*]—A Judge in Chambers has no power to rescind his own order for a writ of *ca. sa.* or to discharge the defendant from custody after the order has been acted upon. *McNabb v. Oppenheimer*, 214.

[See SHERIFF.

ASSETS.

See JUDGMENT, 5.

ASSIZES.

See VENUE, 2.

ATTACHMENT.

Attaching debts — Unascertained costs—Set-off—Payment into court.]

—By the judgment in this action the defendant was found to owe the plaintiff \$115, and he was ordered to pay the plaintiff's costs of action, less some interlocutory costs awarded to the defendant. Subsequent to judgment certain creditors of the plaintiff issued garnishment process from a Division Court, attaching all debts due from defendant to plaintiff.

After the taxation of the plaintiff's costs, but before the taxation of the defendant's interlocutory costs, the defendant paid \$115 into the Division Court, having previously paid another sum of \$115 to the sheriff to procure his release from arrest under a *capias* after judgment in this action.

Held, that the costs coming to the plaintiff constituted an attachable debt before taxation, which was bound by the service of the garnishment process, and properly payable into the Division Court after it was ascertained by taxation; and the defendant could not object that his set-off was not ascertained at the time of payment into Court, as it was by his own default; and therefore the money paid into court pursuant to the attachment was to be taken to be part of the money due to the plaintiff for costs, and not as representing the same debt as the money paid to the sheriff. *Macpherson v. Tisdale*, 261.

See CONTEMPT OF COURT, 2.

AWARD.

See APPEAL, 7—RAILWAY, 3.

BAIL.

See WRIT OF CAPIAS.

BENEVOLENT SOCIETY.

See INSURANCE.

BOND.

See COSTS, 21.

BY-LAW.

See JURISDICTION.

CAPIAS.

See WRIT OF CAPIAS.

CASES.

Allan v. McTavish, 2 A. R. 278, followed.] *See* JUDGMENT 1.

Re Andrews, 11 P. R. 199, distinguished.] *See* INFANT, 2.

The Attorney-General v. Emerson, 10 Q. B. D. 191, followed.] *See* PRODUCTION, 4.

Bank of B. N. A. v. Eddy, 9 P. R. 468, followed.] *See* JURY NOTICE, 4.

Boice v. O'Loane, 3 A. R. 167, followed.] *See* JUDGMENT, 1.

Bolckow v. Foster, 7 P. R. 388, distinguished.] *See* EXAMINATION, 2.

Re Eberts et al. v. Brooke, 10 P. R. 257, reversed.] *See* PROHIBITION, 5.

Exchange Bank v. Newell, 19 C. L. J. 253, distinguished.] See APPEAL, 4.

Garnett v. Bradley, 3 App. Cas. 944, followed.] See COSTS, 2.

Re Harris, 24 Gr. 459, followed.] See COSTS, 10.

Hilliard v. Arthur, 10 P. R. 281, distinguished.] See JUDGMENT, 9.

Hobson v. Sherwood, 4 Beav. 184, followed.] See PARTITION, 1.

Jones v. Monte Video Gas Co., 5 Q. B. D. 556, followed.] See PRODUCTION, 4.

King v. Duncan, 9 P. R. 61, followed.] See APPEAL, 6.

Re Lea, 21 C. L. J. 154, followed.] See RAILWAY, 3.

Leech v. Williamson, 10 P. R. 226, followed.] See INTERPLEADER, 2.

Macfie v. Pearson, 8 O. R. 745, not binding.] See INTERPLEADER, 2.

Masse v. Masse, 10 P. R. 574, reversed.] See JURY NOTICE, 2, 5.

Mills v. Scott, 5 U. C. R. 360, discussed.] See PATENT, 1.

Morton v. Hamilton Provident and Loan Society, 10 P. R. 636, affirmed.] See MORTGAGE, 2.

Re Murdoch, 8 P. R. 132, followed.] See HABEAS CORPUS.

McEwan v. McLord, 46 U. C. R. 235, followed.] See APPEAL, 7.

Re Osler, 24 Gr. 529, followed.] See COSTS, 10.

Parker v. Wells, 18 Ch. D. 477, followed.] See PRODUCTION, 2.

Pawson v. The Merchants Bank, 11 P. R. 72, followed.] See JURY NOTICE, 2, 5.

Quay v. Quay, 11 P. R. 258, approved.] See COSTS, 1.

Rody v. Rody, 1 C. L. T. 146, overruled.] See PARTITION, 1.

Stark v. Fisher, 11 P. R. 235, approved and followed.] See APPEAL, 2—COSTS, 1.

Re Sutton, 11 Q. B. D. 377, distinguished.] See COSTS, 25.

Synod v. DeBlaquiere, 10 P. R. 11, followed.] See EVIDENCE.

Taylor v. Bradford, 9 P. R. 350, distinguished.] See JURY NOTICE, 3.

Thomson v. South-Eastern R. W. Co., 9 Q. B. D. 320, followed.] See STAYING PROCEEDINGS.

Thornton v. Capstock, 9 P. R. 535, followed.] See PARTICULARS, 2.

Turnbull v. Forman, 15 Q. B. D. 234, followed.] See JUDGMENT, 8.

Vogt v. Boyle, 8 P. R. 249, referred to.] See PROHIBITION, 4.

CAUSE OF ACTION.

Joinder of causes of action—Rule 116, O. J. A.—Where the writ of summons was indorsed with a claim for the recovery of land and for mesne profits, but the statement of claim asked specific performance of the contract by the defendant to buy the land from the plaintiff, and in the

event of specific performance not being decreed, possession, &c., and no order had been obtained for leave to join another cause of action with a claim for the recovery of land, as required by rule 116, O. J. A., and a motion was made to set aside the writ of summons and statement of claim, or one of them.

Held, that the causes of action were improperly joined in the statement of claim without leave, but inasmuch as the two causes of action could not conveniently be prosecuted separately, leave was given to amend the writ by adding a claim for specific performance, or the statement of claim by striking out such claim, at the plaintiff's option. *Campbell v. James*, 347.

See COUNTER-CLAIM.

CERTIORARI.

See CONVICTION, 3.

COMMISSION.

See EXECUTOR.

COMMITTAL.

Bringing in accounts—Motion to commit—G. O. Chy. 201 and 296.]
—G. O. Chy. 201 and 296 are still in force in the Chancery Division.

Upon a motion to commit the defendant (an administrator) for neglecting to bring in his accounts before a day named pursuant to the direction of the Master,

Held, that personal service upon the defendant of the Master's direction and of the notice of motion to

commit was not necessary. *Re Harnden, Harnden v. Harnden*, 35.

See CONTEMPT OF COURT, 1.

COMPENSATION.

See EXECUTOR, 2, 3.

CONTEMPT OF COURT.

1. *Motion, enlargement of—Terms, violation of—Contempt of Court—Imprisonment—Discharge—Costs.*]

—Where a party obtains an enlargement of a motion for the purpose of procuring further affidavits, but does not comply with the terms on which the enlargement was granted, he is not entitled to read the affidavits.

Where a party is in prison for contempt, and has apologized but has not paid the costs of his committal, &c., the proper order to make upon a motion for his discharge, is that he be continued in prison for his contempt for a time certain, unless the costs of the proceedings against him are sooner paid. *Campbell v. Martin*, 509.

2. *County Judge, jurisdiction of—Prohibition—48 Vic. ch. 26, sec. 6 (O.)—Persona designata.*]
—A Judge of a County Court, acting under the authority of 48 Vic. ch. 26, sec. 6, (O.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the Judge made an order for the issue of a writ of attachment against the first assignee for contempt.

Held, that the Judge, in acting under the statute, was not exercising

the powers of the County Court, but an independent statutory jurisdiction as *persona designata*, and had therefore no power to direct the issue of a writ of attachment; and prohibition was ordered. *Re Pacquette*, 463.

3. *Disobeying order—Contempt of Court—Appeal — Staying proceedings.*]—A party who has been ordered by the Court to attend for further examination after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order.

Proceedings under the order will not be stayed pending the appeal. *MacGregor v. McDonald et al.*, 518.

CONVENIENCE.

See VENUE, 4.

CONVICTION.

1. *Criminal law—Conviction for keeping house of ill-fame—32 & 33 Vic. ch. 32—Use of the word “order” instead of “adjudge,” in conviction—Forfeiture of fine—Further imprisonment—Fine payable to magistrate—Evidence.*]—The defendant was convicted under the proceedings taken under 32 & 33 Vic. ch. 32, (D.), not 32 & 33 Vic. ch. 28, (D.), for keeping a house of ill-fame. The conviction merely “ordered” but did not “adjudge” any imprisonment or any forfeiture of the fine imposed:

Held, bad, as substituting the personal order of the magistrate for a condemnation or adjudication. The conviction and warrant of commitment ordered the defendant to be imprisoned for six months, and to

pay within the said period to said magistrate the sum of \$100 without costs to be applied according to law, and in default of payment before the termination of said period, further imprisonment for six months: *Held*, bad, for uncertainty in requiring the fine to be paid to the magistrate personally instead of to the gaoler.

On the facts set out in the report, *Held*, that there was no evidence of the offence charged, and that the defendant must be discharged. *Regina v. Newton*, 98.

2. *Vagrant — Conviction — Evidence—32 & 33 Vic. ch. 28, sec. 1 (D.).*]—The defendant was summarily convicted under 32 & 33 Vic. ch. 28, sec. 1 (D.), as “a person who, having no peaceable profession or calling to maintain himself by, but who does, for the most part, support himself by crime, and then was a vagrant,” &c.

The evidence shewed that the defendant did not support himself by any peaceable profession or calling, and that he consorted with thieves and reputed thieves; but the witnesses did not positively say that he supported himself by crime.

Held, that it was not to be inferred that the defendant supported himself by crime; that to sustain the conviction there should have been statements that witnesses believed he got his living by thieving, or by aiding and acting with thieves, or by such other acts and means as shewed he was pursuing crime. *Regina v. Organ*, 497.

3. *Criminal law — Conviction—Award of further imprisonment—32 & 33 Vic. ch. 32, secs. 28, 30, (D.).—Formal defect—Certiorari.*]—A conviction, in this case for keeping a disorderly house and house of ill

fame, was held bad for awarding, after the adjudication of a penalty by fine and imprisonment, further imprisonment in default of sufficient distress or of non-payment of the fine; and *Held*, also, that this was not a mere formal defect within sec. 39 of 32 & 33 Vic. ch. 32, (D.)

Held, also, that the effect of sec. 28 was not to take away the writ of *certiorari*. *Regina v. Richardson*, 95.

COSTS AND SECURITY FOR COSTS.

1. *Action against magistrates—Costs, scale of—R. S. O. ch. 73, secs. 12, 18, 19—Appeal from taxation—Time—Rule 427, O. J. A.*—In an action against Justices of the Peace for false imprisonment, &c., the Divisional Court (10 O. R. 631) ordered judgment to be entered for the plaintiff for \$25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of Court might direct. Upon appeal from taxation;

Held, that the action being within the proper competence of the Divisional Court (unless the defendant objected thereto) the plaintiff should have costs only on the scale applicable to that Court, and the defendants should have their proper costs by way of deduction or set-off.

Held, also [CAMERON, C. J., *dubitante*], that the effect of R. S. O. ch. 73, sec. 19, read in connection with sec. 12 of that Act and with R. S. O. ch. 43, sec. 18, sub-sec. 5, R. S. O. ch. 47, sec. 53, sub-sec. 7, and R. S. O. ch. 50, sec. 347, is not to provide that the plaintiff should have costs on the Superior Court scale when his recovery is within the jurisdiction of an inferior Court.

Per CAMERON, C. J. The case came under sec. 18 rather than sec. 19 of R. S. O. ch. 73.

Appeals from taxation should be brought on within a reasonable time, and within eight days, the time limited for appeals under Rule 427, O. J. A., is a reasonable time.

Stark v. Fisher, 11 P. R. 235, and *Quay v. Quay*, 11 P. R. 258, approved. *Ireland v. Pitcher et al.*, 403.

2. *Costs—Damages—Libel—Rule 428, O. J. A.*—Where in an action of libel a verdict for \$1 damages was found, and the Judge at the trial gave no certificate for costs.

Held, that the plaintiff was entitled to tax full costs.

Garnett v. Bradley, 3 App. Cas. 944, considered and followed. *Wilson v. Roberts*, 412.

3. *Costs—Third party—Indemnity—Rules 107, 108, O. J. A.*—The defendants, being sued as carriers for the loss of goods in transit under a contract between the plaintiffs and defendants, gave notice under Rules 107 and 108 to the third parties that they claimed indemnity from them, under a contract to which the plaintiffs were strangers; the third parties appeared, and an order was made that they should be at liberty to assist in defending the action and should be bound by the result as regards the liability of the defendants to the plaintiffs. The plaintiffs were nonsuited at the trial.

Held, that the plaintiffs were not liable for the costs of the third parties, or for the costs occasioned by joining them; nor were the defendants liable for such costs. *Tomlinson et al. v. The Northern Railway Company of Canada et al.*, 419.

4. *Mechanic's lien—Costs, scale of.*—Where the plaintiff's claim in an action to enforce a mechanic's lien was only \$142, but at the time the action was begun the aggregate amount of the liens (the plaintiff's and another) registered against the property was over \$200 :

Held, that the action was properly brought in the High Court of Justice, and the costs should be on the scale of that Court, and it made no difference that the other lien-holder failed to substantiate his claim. *Hall v. Pilz et al.*, 449.

5. *Costs—Third party—Appeal—Discretion—Sec. 32, O. J. A.*—*Held*, that the order of ARMOUR, J. (No. 3 *supra*), refusing the third parties their costs, was made in the exercise of a discretion, which by sec. 32, O. J. A., was not subject to review without leave, and, as no such leave had been given, an appeal from the order was dismissed with costs.

The Court directed that such part of the costs incurred by the third parties in establishing the defence as might properly have been incurred by the defendants, should be allowed by the taxing officer. *Tomlinson et al. v. The Northern R. W. Co. of Canada et al.*, 526.

6. *Staying proceedings—Interlocutory costs—Default—Practice in equity and at common law.*—In equity, if interlocutory costs payable by the plaintiff remained unpaid, the Court might, but was not bound to, stay proceedings, and would not if it were not equitable to do so.

At common law, while non-payment of such costs was not a ground for staying proceedings, yet if it appeared equitable to stay proceedings until they were paid, the Court in

the exercise of its inherent jurisdiction might direct a stay.

The common law practice is the more convenient one, and should now be followed.

And where the plaintiff served in succession four notices of trial for the same Assizes, all of which were set aside as irregular, with costs against him, and he was in default for non-payment of such costs, the action was stayed until they should be paid. *Stewart v. Sullivan*, 529.

7. *Costs—Scale of.*—An order in Chambers referred an action in the High Court of Justice to a Master to assess the damages, and directed that the costs should be taxed to whichever party was successful in a certain appeal. There was no trial, and no judgment was entered. The Master assessed the damages at \$60, and the taxing officer taxed to the plaintiff, who succeeded in the appeal, his costs upon the High Court scale.

Held, that the officer had no power under the order to determine the scale of costs, and he was therefore right in taxing upon the scale of the Court in which the action was brought. *McGarvey v. The Corporation of the Town of Strathroy*, 57.

8. *Costs, scale of—Attacking fraudulent conveyance—Amount of claim—Creditors' Relief Act, 1880 (O).*—The plaintiffs had judgment and execution against one of the defendants for less than \$200, and sought in this action, though not on behalf of all creditors, to set aside a conveyance by that defendant to the other, as fraudulent. At the trial this action was dismissed. At the time it was brought the sheriff had other executions in his hands against

the same defendant, amounting to more than \$200.

Held, that if the plaintiffs had been successful all the executions must have been satisfied out of the property covered by the impeached conveyance, and the provisions of the Creditors' Relief Act would have applied to the case, and therefore the amount of the subject matter involved exceeded \$200, and the costs were taxable on the High Court scale.

It is proper practice to obtain a direction of a Judge as to the scale of costs before they are taxed. *Dominion Bank v. Heffernan et al.*, 504.

9. *Costs, scale of—Rule 515, O. J. A.—Law Reform Act, 1868—Illegal distress—Injunction—Damages.*—The defendants under a mortgage for \$2,300, made by plaintiff's father and containing a distress clause, distrained the plaintiff's goods for interest amounting to \$112.55.

The plaintiff claimed that the distress was illegal and should be set aside, that the defendants should be enjoined from selling the goods distrained, and that the plaintiff should be paid \$200 damages, or if the distress should be held legal, that the plaintiff should be subrogated to the right of the defendants under their mortgage, as against the mortgagor.

The judge at the trial found in favour of the plaintiff, assessing the damages at \$25, and granting the injunction prayed for; but this judgment was reversed by the Divisional Court and judgment for defendants was ordered to be entered, with costs.

Held, that the action was not one that could properly have been brought under the equity jurisdiction of the County Court before the passing of the O. J. A. and Law Reform Act, 1868, though the arrears of

interest and the damages found by the learned Judge were less than \$200; and therefore the case did not come under Rule 515, O. J. A., and the costs should be taxed on the scale of the High Court. *McDonell v. The Building and Loan Association*, 413.

10. *Scale of costs—Surrogate Court—Case transferred to High Court.*—In the case of an action transferred from a Surrogate Court to the High Court of Justice, the costs of the proceedings in the Surrogate Court previous to the transfer should be taxed on the scale provided by the Rules of 1858, *i.e.*, as nearly as possible on the County Court scale.

Re Harris, 24 Gr. 459, and *Re Osler*, 24 Gr. 529, explained and followed. *Peel v. Peel*, 195.

11. *Costs of official guardian—Fraud by infant.*—The official guardian's costs of defending this action on behalf of an infant defendant were ordered to be paid by the plaintiff, notwithstanding that judgment was pronounced in favour of the plaintiff against the infant defendant, and that the latter had been found to be a party to the fraud which occasioned the action. *Westgate v. Westgate et al.*, 62.

12. *Costs—Taxation—Items of bill.*—Upon an appeal from the taxation of the plaintiff's party and party costs,

Held, (1) A counsel fee for settling plaintiff's reply to defendants' counterclaim should have been taxed,

(2) The costs of a similitur with jury notice were properly disallowed.

(3) Instructions for the examination of the plaintiff, and of the defendants, each \$2.00, should have been taxed.

(4) Attendances to bespeak copies of depositions of parties on their examination for discovery in the action should have been taxed.

(5) The plaintiff was not bound to rely on the admissions of the defendants on their examination for discovery, and therefore the costs of procuring the attendance of a witness to prove what was then admitted should have been taxed.

(6) A fee for attending to hear judgment on a day fixed, when the Judge deferred it till a subsequent day at Toronto should have been taxed.

(7) The discretion of the taxing officer as to counsel fee at the trial should not be interfered with.

(8) Where the Judge directed reasons for judgment in plaintiff's favor to be put in, the plaintiff's charges for drawing, settling, engrossing, &c., such reasons, should have been taxed.

(9) A fee for attending to hear judgment at Toronto should have been taxed, although a fee on a previous attendance, when judgment was deferred, had been allowed, and a charge for sending a telegram advising defendants of result of judgment, by direction of Judge, should have been allowed.

(10) Instructions for common affidavit of disbursements was properly disallowed.

(11) Where there is no daily peremptory list of cases at the Assizes, it is necessary to keep the witnesses in attendance from the first day, and the fees for such attendance should have been taxed. *Alexander v. School Trustees of Gloucester*, 157.

13. *Notice of motion—Irregularity—Costs.*—Where the defendant's solicitor was served with a short

notice of motion, which was admitted to be defective,

Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to shew that the notice was irregular. *Waller v. Claris*, 130.

14. *Costs of trial where jury disagree—R. 423, O. J. A.*—“*Following the event,*” meaning of.]—The costs of a trial which was abortive because the jury disagreed, no order to the contrary having been made by the Judge at the trial, were *held* taxable against the defendants by the plaintiff, who ultimately succeeded. *Copeland v. The Corporation of the Township of Blenheim*, 54.

15. *Indemnity—Costs—Solicitor and client—Party and party.*—W. sold land to H., and covenanted to indemnify him against a mortgage thereon.

Held, that H. was not entitled to solicitor and client, but only to party and party costs of an action on the covenant. *Hutton v. Wanzer*, 302.

16. *Postponing trial—Absence of material witness—Disposition of costs.*—The costs of moving to postpone a trial on account of the absence of a material witness, will be costs in the cause, where the party moving has made diligent efforts, &c., to secure the attendance. *Brown v. Porter, Knox v. Porter*, 250.

17. *Costs—Taxation—Appeal—Local officer—Time—Rule 427, O. J. A.*—Appeals from taxation by local officers must be brought on within eight days from the date of the taxing officer's certificate. *Stark v. Fisher*, 235.

18. *Costs—Taxation—Tariff—Foreign witness—Rules of T. T. 1856, 154 and 168.*]—The tariff of costs now in force does not pretend to exhaust all possible items or services for which remuneration is to be made. The object of a tariff is to provide a fixed or movable scale for usual and ordinary services, and as to all items embraced therein it is generally conclusive, but for other matters one has to go outside of the tariff to the practice and course of the Court. It is therefore for the taxing officer to determine, according to a proper discretion, what allowance to make for procuring the attendance of witnesses who live out of the jurisdiction.

Rules 154 and 168 of T. T., 1856, are still in force as to matters not embraced in the tariff of 1881. *Ball et al. v. Crompton Corset Co.*, 256.

19. *Security for costs—Case in Court of Appeal.*]—The plaintiffs having recovered judgment in the action, the defendant appealed to the Court of Appeal, and then moved to compel the plaintiffs to give security for costs, on the ground that they resided out of the jurisdiction, and had since the recovery of judgment ceased to carry on business in this Province, and withdrawn their assets therefrom.

The motion was refused. *Exchange Bank v. Barnes*, 11.

20. *Costs, security for—Reducing amount—Rules 429, 431, O. J. A.*]—An order amending a præcipe order for security for costs, issued under Rule 431, O. J. A., by reducing the security to \$200, cash paid into Court, was reversed, where no reason was shewn for making the reduction.

Held, that Rule 429, O. J. A., does not authorize the reduction of the

sum named in Rule 431, O. J. A. *Riddell v. McKay*, 459.

21. *Security for Costs—Delivery out of bond to the bondsman—Case in the Court of Appeal.*]—The plaintiff, who lived out of the jurisdiction, obtained a judgment at the trial which was affirmed by the Divisional Court, except as to one defendant, against whom the action was dismissed, without costs.

Held, pending an appeal to the Court of Appeal by the other defendants, that the plaintiff was entitled to have his bond for security for costs taken off the files and delivered up to be cancelled. *Hately v. The Merchants' Despatch Transportation Company et al.*, 9. [Reversed in C. A., 12 A. R. 640.]

22. *Payment into Court—Defence—Retention of money as security for costs—R. 217, O. J. A.*]—The statement of defence set up that the assault complained of was in self-defence, and, as an alternative defence, that while the defendant did not admit his liability for damages, he brought into Court \$150 and said that the same was sufficient, &c.

Held, that the money paid into Court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case was made for ordering security for costs. *Rogers v. Loos*, 118.

23. *Security for costs—Action on behalf of others—Financial incompetency of plaintiff.*]—One S., a contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company and a creditor opposing the petition, where it appeared that S., although he had a nominal

interest as the holder of stock upon which nothing was paid, was not in such a position that anything would be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified him as to costs. *Re Rainey Lake Lumber Co.*, 314.

24. *Security for costs—Co-defendant—Counter-claim.*]—A defendant asking relief against his co-defendant will not be ordered to give security for costs on the ground of residence out of the jurisdiction.

Semble, such relief should not be asked by way of counter-claim. *Walmsley v. Griffith et al.*, 139.

25. *Solicitor and client—Costs—Payment—Delivery of bill.*]—Solicitors retained out of moneys in their hands, belonging to their client, sufficient to pay their costs, and handed the client a cheque for the balance. The client took the cheque but did not cash it until she had written to the solicitors stipulating that the cashing should be without prejudice to her right to recover a larger sum, if such was due her.

After the lapse of a year from the receipt of the cheque, the client applied for an order for the delivery of a bill of costs.

Held, that the circumstances did not amount to payment of the costs, and the order for delivery was made.

Re Sutton, 11 Q. B. D. 377, distinguished. *Schragg v. Schragg*, 218.

See APPEAL, 4, 12—ATTACHMENT—CONTEMPT OF COURT, 1—COUNSEL FEES—EXECUTOR, 1—INFANT, 4—INTER M ALIMONY—INTERPLEADER, 1, 3—MORTGAGE, 2—RAILWAY, 3—PROHIBITION, 3—SET-OFF, 2—SOLICITOR'S LIEN—VENUE, 2.

COUNSEL FEES.

Counsel fees—Powers of local taxing officers—Administration of Justice Act, 1885.]—The *Administration of Justice Act, 1885*, has not conferred upon local Registrars of the High Court the power of taxing counsel fees of any greater amount than is allowed by the tariff of costs in force. *The Bank of British North America v. The Western Assurance Company*, 30.

See APPEAL, 4—COSTS, 12—INTERIM ALIMONY,

COUNTER-CLAIM.

Claim and counter-claim—Negligence—Libel—Inconvenience—Rules 127 (b.), 168, O. J. A.]—In an action for damages for negligence, a counter-claim for libel was excluded, on the ground of the inconvenience which would arise in trying the two causes of action together, but leave to bring an independent action was given. *McLean v. Hamilton Street Railway Company*, 193.

See COSTS, 24—SET-OFF.

See SOLICITOR'S LIEN, 3.

COUNTY COURT.

See INTEPLEADER.

CREDITORS' RELIEF ACT, 1880.

See COSTS, 8.

CROSS-ACTIONS.

1. *Cross-actions—Equitable claim—Damages—Trial—Jury—Issue.*]

—I. brought this action against S. in the Chancery Division claiming (1) foreclosure of certain mortgages, (2) upon an open account, (3) damages for breach of a contract; and S. sued I. in the Queen's Bench Division for damages arising out of the same contract, with which also I.'s other claims were connected. On a motion to strike out a jury notice, S. offered to let I. have judgment upon the mortgages and the open account, with a reference as to the amounts, subject to a defence which he raised as to a contract by I. to purchase the property covered by the mortgages.

Boyd, C., directed (1) the trial of an issue, at a sittings of the Chancery Division, as to the defence raised by S.; (2) that the claim for damages in this action should be tried by a jury at the same time and place as the cross-action: and (3) that I. should have judgment upon the mortgages and open account, with a reference, which was to be stayed pending the trial of the issue directed.

Irwin v. Sperry, 229.

2. *Causes of action—Separation—Consolidation.*]

The plaintiffs in their first action claimed from the defendants a sum of \$200,000 as the balance due upon a construction contract, and in this action, begun some time after the first, they claimed from the same defendants a sum of \$3,000, the amount of an account for goods sold and delivered. The cause of action herein arose before the commencement of the previous action. The first action was practically consolidated with an action of the defendants against the plaintiffs, in the Chancery Division.

Held, that the two claims should have been made in the one action, and that it was a proper exercise of discretion to leave the claim in this action to be tried with the claim to which it should originally have been joined. *Conmee et al. v. Canadian Pacific Railway Company (No. 2)*, 222.

See JURY NOTICE, 3 — STAYING PROCEEDINGS.

DAMAGES.

See ARREST, 2—COSTS, 2—CROSS-ACTIONS, 1—PATENT, 2.

DEBTOR.

See EXECUTION.

DEFENCE.

See LIMITED DEFENCE—SET-OFF, 1,

DEPOSIT.

See VENDOR AND PURCHASER, 2.

DISCHARGE.

See ARREST, 1.

DISCRETION.

See APPEAL, 6.

DISCOVERY.

See EXAMINATION — PRODUCTION.

DISCRETION OF COURT.

See APPEAL, 1.

DISCRETION OF JUDGE.

See COSTS, 5.

DIVISION COURT.

See COSTS, 1—IMPRISONMENT FOR DEBT,—JUDGMENT, 3—MORTGAGE, 1—PROHIBITION.

DIVISIONAL COURT.

See JURISDICTION—INTERPLEADER, 4—VENUE, 2, 5.

DOWER.

Dower—Pleading and practice—O. J. A.—Dower Procedure Act.—The writ of summons was indorsed under the O. J. A. with a claim for dower and arrears of dower. The defendant entered an appearance, but added to it an acknowledgment of the plaintiff's right to dower, and a consent to her taking proceedings to have the same assigned to her under the Dower Procedure Act, R. S. O. ch. 55. The plaintiff delivered a statement of claim, taking no notice in it of the acknowledgment and consent, and claiming dower and arrears.

Held, that it was necessary for the plaintiff to deliver a statement of claim in order to recover her dower, and she could not, having elected to institute proceedings under the O. J. A., be compelled to take any steps under the Dower Act.

Moore v. G. Moore—Moore v. P. Moore, 324.

See PARTITION, 2.

EJECTMENT.

Changing place of trial—Ejectment—Rule 254, O. J. A.—R. S. O., ch. 51, sec. 23.—In an action of ejectment the place of trial may be changed by order of a Judge. If the power to change is not given by Rule 254, O. J. A., it is not taken away thereby, and it previously existed under R. S. O., ch. 51, sec. 23. *Canadian Pacific Railway Co. v. Manion*, 247.

See CAUSE OF ACTION—VENUE, 3.

ESTOPPEL.

Order dismissing action—Rule 255, O. J. A.—An order made at Chambers under Rule 255, O. J. A., dismissing the action for want of prosecution where issue had been joined, but the case had not been set down for trial nor notice of trial given, was *Held*, not a dismissal on the merits and not a bar to a subsequent action for the same cause. *Roberts v. Lucas*, 3.

EVIDENCE.

Opening up case—Discovery of fresh evidence—Jurisdiction of trial Judge—R. S. O. ch. 38, secs. 22, 46.—An application to open the case and put in further evidence, and for a new trial upon fresh evidence, or for leave to bring a new action upon a part of the original claim founded upon such

evidence, is properly made to the Judge who heard the original cause.

Seemle, R. S. O. ch. 38, sec. 46, would have the effect of preventing an appeal from a judgment more than a year old, unless leave were obtained from the Court of Appeal; but if new evidence were admitted, and the case heard anew, the time for appealing would run from the date of the later judgment.

Seemle, also, R. S. O. ch. 38, sec. 22, was not intended to apply to newly discovered evidence.

Synod v. DeBlaquiere, 10 P. R. 11, followed. *Bank of British North America v. The Western Assurance Company*, 434.

See ADMISSIONS — ARREST, 2 — CONVICTION, 1, 2 — EXAMINATION — FOREIGN COMMISSION, 2 — TRIAL, 2.

EXAMINATION.

1. *Discovery — Information for purpose of pleading — Rule 285, O. J. A. — Discretion.*] — Where the plaintiff had a good cause of action against the defendant, but was unable to frame his statement of claim unless he could examine the defendant and his employer, who was not a party to the suit;

Held, that he was entitled to such discovery under Rule 285, O. J. A., and that an order for such examination by a local Judge of the High Court had been properly made. *Gordon v. Phillips*, 540.

2. *Examination — Party resident out of jurisdiction — Conduct money — Objections.*] — The president of the plaintiffs lived in the U. S., but being in Toronto, he was there subpoenaed on the 22nd April to attend

on the 28th April, for examination for discovery before a special examiner at Toronto. He was paid \$1, and made no objection as to the amount, nor did he object that he was prevented by engagements from attending, but he failed to attend.

Held, that he should have attended on the day appointed, and that the fact that there were then pending against him, at the instance of a stranger to the action, proceedings for perjury, which might affect some point in controversy, though it might be a reason for his refusing to answer any question on this point, was not a reason for refusing to attend at all; and he was ordered to attend at his own expense.

Bolckow v. Foster, 7 P. R. 388, distinguished. *George T. Smith Company v. Greey et al.*, 345.

3. *Discovery — Rule 285, O. J. A. — Examination.*] — The plaintiff, who was the father of A. S. M., an insolvent trader, sued the assignee and trustee for the benefit of creditors of A. S. M., claiming a declaration of right to rank on the estate for a large sum.

The assignee was instructed by the creditors to resist the claim, and had himself no personal knowledge of it, and could find no entry of it in the books or papers of A. S. M.

Under these circumstances an order under Rule 285 for the examination of A. S. M. by the defendant, for the purposes of discovery before the trial, was affirmed. *Murray v. Warner*, 440.

4. *Extraordinary discovery — Rule 285, O. J. A. — Discretion of Court — Information for purpose of pleading.*] — The right of extraordinary discovery must be jealousy guarded, lest it be abused, and it should under

Rule 285, O. J. A., be conceded only when it is clearly proved to be necessary for the furtherance of justice. An application to examine under Rule 285 is in the discretion of the Court, and that discretion cannot be said to have been wrongly exercised in allowing the defendant to examine the plaintiff and three witnesses before delivering the defence, in order to obtain for the purpose of pleading a knowledge of material facts, which the defendant could not otherwise get. *Boulton v. Blake*, 196.

5. *Examination before trial—Witness—Rule 285.*]—A clerk in a Toronto warehouse accepted a bill of exchange on behalf of his employer, who resided in Philadelphia, U. S. A.

In an action on the bill the employer denied the authority of his clerk to accept.

Held, that the clerk could not be examined under Rule 285, O. J. A.

Semble, neither could the Toronto manager of the business be examined under the Rule. *Rosenheim v. Silliman*, 7.

6. *Settled Estates Act—Separate examination of married women—M. W. P. Act, 1884, (O.)*]—Upon a petition under the Settled Estates Act, *Boyd, C.*, dispensed with the examination required by the Act of a married woman interested who lived out of the jurisdiction, but not of one who lived within the jurisdiction.

The Married Women's Property Act, 1884, (O.,) does not apply to cases under the Settled Estates Act, where the woman had acquired the property before the passing of the former Act. *Re English*, 198.

7. *Eamination of witnesses before trial—Discovery—Rule 285, O. J. A.*]

—The defendants asserted as a counter-claim in this action a claim against the plaintiff which they had bought from the assignee for creditors of F. and L., stock brokers, who were not parties to the suit. This claim was the balance of an account for carrying stock for the plaintiff. The plaintiff swore that he believed that F. and L. had dealt improperly with the stock that they were carrying for him, but that he had no means of discovering what they had done with it unless by examining them.

Under these circumstances an order was made under Rule 285, O. J. A., for the examination of F. & L., for the purpose of discovery only. *Carnegie v. Cox & Worts*, 311.

8. *Libel — Examination — Rule 285.*]—In an action for libel against a newspaper, the defendants, on a motion under Rule 285, O. J. A., were allowed to examine, with certain restrictions, the plaintiff before defence filed. *Tate v. The Globe Printing Company*, 253.

9. *Judgment against partnership—R. 322, O. J. A.—Examination of one of several defendants—Sec. 156, C. L. P. A.—Admission by one partner.*]—The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership binds all the partners, unless they seek, by an examination of some of themselves, to contradict or qualify the statements of the partner whose evidence they object to. *Taylor v. Cook, Despond, & Co.*, 60.

See CONTEMPT OF COURT, 3—PARTICULARS, 2 — PRODUCTION, 2 — SPECIAL EXAMINER—TRIAL, 2.

EXECUTION.

Ca. sa.—Execution—R. S. O. ch. 69.—A defendant arrested and imprisoned under a *ca. sa.* is a debtor in close custody in execution within the meaning of R. S. O. ch. 69. *Hay v. Paterson*, 114.

EXECUTION CREDITOR.

See ADMINISTRATION—INTERPLEADER, 2.

EXECUTOR.

1. *Executor—Compensation—Mode of fixing commission—Division between executors—R. S. O. ch. 197, sec. 36-40—Costs as between solicitor and client out of estate—Practice—Adjournment from chambers into court—Proper time to apply—G. O. 642—Rule 428, O. J. A.*—C. M. died in May, 1884, having by his will made W. M. sole legatee and devisee of all his property excepting an annuity of \$400, payable to his widow, and he appointed F. and W. M. his executors. F. had presented this petition claiming compensation as such executor. The evidence showed the estate to have consisted of about \$115,000, of which \$32,000 was money, and the rest debentures and stocks of various descriptions, a great many being payable to bearer; also, that what little actual work F. had done consisted of acts done for conformity at the bidding of the private solicitor of W. M., excepting that he successfully exerted himself to procure an additional sum for the widow from W. M., who himself did practically nothing.

Held, that the petitioner should be allowed as compensation, a com-

mission of three and a half per cent. upon the whole of the estate, and in fixing that sum the work done by F. in connection with procuring the increased sum for the widow was to be considered.

Our courts have adopted a commission as a means, in ordinary cases, of ascertaining or measuring the compensation of trustees and executors under R. S. O. ch. 107, and the usual commission allowed is five per cent. upon the amount of the estate got in and properly paid over, and in ordinary cases, this commission is allowed on the determination of the trust, and looking at the relative amount of work done by F. in this case, compared to that done by W. M., F. was entitled to one per cent. more than the half of the five per cent. commission.

Held, also, that in this case the costs of the petitioner must be paid as between solicitor and client out of the estate, including his costs of the appeal and cross-appeal from the report of the Master in Ordinary.

Where, after the argument in chambers of an appeal from the Master's report, counsel for one of the parties asked that the appeal might be treated as though argued in court, and any order made thereon issue as a court order; or, at all events, that costs should be allowed as of a court motion,

Held, that although the appeal would, on account of its nature, have been adjourned into court, if such adjournment had been asked before the argument of it, the present application was too late, and the court had no power to grant it. *Re Fleming*, 272. (But see *infra.*, 3.)

2. *Executors—Compensation—Administration—Interest.*—Execu-

tors claimed compensation in respect of receipts amounting to \$29,000, and of disbursements amounting to \$5,000. All the work of collecting and paying over was done after an order for administration had been made, and was done under the advice of solicitors, and in the more important matters under the direction of the Master. An item introduced on each side of the account was a transfer of mortgage to the plaintiff, amounting to \$4,684.47, which was carried out in pursuance of an arrangement made by the solicitors and sanctioned by the Master. It also appeared that the plaintiff's solicitor collected and handed over to the executors \$2,400, and also made a payment to them of \$10,000 for which he was personally liable.

Held, that although the administration order did not put an end to the functions of the executors, yet it greatly diminished their responsibility, and it did so in this case to an almost vanishing point; and the compensation was reduced from \$1,193 to \$440, nothing being allowed in respect of the item of \$4,684.47, one per cent. in respect of the items of \$2,400 and \$10,000, two and a half per cent. on the balance of the collections, and five per cent. on the disbursements except the transfer.

The executors retained in their hands a sum of \$1,100 to meet claims against the estate, and were not called upon to pay it into Court.

Held, that the amount retained was not unreasonable, and that the executors were not chargeable with interest in respect of it. *Thompson v. Fairbairn*, 333

3. *Executor — Compensation — R. S. O. ch. 107, secs. 37, 41.*—The

order of *FERGUSON, J.*, *supra* 1, reversed, and the Master's report restored.

Held, that the right of an executor to compensation depends entirely upon R. S. O. ch. 107, secs. 37, 41, and as that statute has fixed no standard, each case is to be dealt with on its own merits, according to the discretion of the Judge. The Courts have laid down no inflexible rule in this regard, and the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute.

Held, also, that there was no duty cast upon the petitioner which required him to act against the interests of his co-executor, nor did he incur any appreciable additional risk or responsibility, and he was therefore not entitled to a larger share of the commission awarded. *Re Fleming*, 426.

FOREIGN COMMISSION.

1. *Foreign commission—Issue on pleadings.*—Upon an application for a foreign commission it is not necessary to shew that the action is technically at issue: it is sufficient that it be shewn that some issue is raised on the pleadings which must be tried in the action. *Smith et al. v. Greey et al.*, 38.

2. *Foreign commission—Evidence—Solicitor—Restricting disclosure.*—*Held*, that the Court in permitting a foreign commission to be opened before the trial, will not impose restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solicitors by such opening. *Smith et al. v. Greey et al.*, 238.

FOREIGN TRUSTEE.

See INFANT, 3.

FRAUD.

See COSTS, 11.

GARNISHMENT.

See ATTACHMENT—JUDGMENT, 6.

HABEAS CORPUS.

Habeas corpus—Return—Infant, custody of—R. S. O. ch. 130, sec. 1.—A return was made by the mother of the infants, in whose custody they were, to a writ of *habeas corpus* obtained by the father with the object of compelling the delivery of their custody to him. The return stated that they were all under twelve, the age mentioned in R. S. O. ch. 130, sec. 1.

Held, upon demurrer, that the return must be considered in the light not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law.

Re Murdoch, 8 P. R. 132, explained and followed. *Re Smart Infants*, 482.

HEIR-AT-LAW.

See JURY.

HUSBAND AND WIFE.

See WITNESS.

IMPRISONMENT FOR DEBT.

Prohibition — Division Court — Imprisonment — Division Court Clerk.—The order of a Division Court Judge upon judgment summons directed that the defendant should pay the judgment debt within a fixed period, and in default that he should be committed to gaol.

Held, that the part of the order as to imprisonment was not sustainable; the defendant, if he did not pay within the time limited, was entitled to a day to shew cause why he did not pay; and prohibition was ordered.

Seem, the defendant should have called upon the clerk of the Court to shew cause against the issuing of any order for imprisonment, as such order is merely a ministerial act. *Re Woltz v. Blakely*, 430.

INDEMNITY.

See COSTS, 3—INFANT, 4.

INDIAN.

Judgment—Indian—C. S. C. ch. 9 — Indian Act, 1880 (D.)—On an application which was granted under Rule 80, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve,

Held, that since the repeal of C. S. C. ch. 9, there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, sec. 77, (D) the judgment will not bind any property of the Indian except that described in sec. 75. *Bryce, McMurrich & Co. v. Salt*, 112.

INDORSEMENT.

1. *Writ of summons—Indorsement—Claim.*—The writ of summons was issued against three defendants, O., A., and R. The indorsement claimed to have set aside a deed from A. to O., and a deed from O. to A. No claim whatever was made against R., and he was not mentioned in the indorsement.

Held, that the indorsement was sufficient, and a motion by R. to set aside the service upon him was refused. *Gilmore v. The Township of Orford et al.*, 437.

2. *Writ of summons—Irregularity—Residence—Form 1, O. J. A.*—A writ of summons not indorsed with a statement of the plaintiff's residence, as set out in Form 1, O. J. A., is irregular. *Sherwood et al. v. Goldman*, 433.

See JUDGMENT, 2.

INFANT.

1. *Infants' money—Payment out of Court—Directions of will.*—A sum of money left by McD. in his will to his daughter, who predeceased him, was paid into Court by McD.'s executors. The daughter by her will had disposed of the moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' shares and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reason to anticipate danger to the money if paid out to the executor.

Held, that the will of the testatrix should be respected, and the infants' money paid out to the executor. *Re McDougall Trusts*, 494.

2. *Infants—Bequest—Foreign guardian.*—An application for an order sanctioning the payment of a bequest in favour of infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a Surrogate Court, was refused, and the executors were ordered to pay the amount of the bequest into Court.

Re Andrews, infra, 3, distinguished. *Re Parr*, 301.

3. *Insurance moneys—Infants—Foreign trustee—Security—47 Vic. ch. 20, (O.)*—A foreigner was appointed trustee for infants under 47 Vic. ch. 20, (O.) to receive insurance moneys, without being required to give security in this Province, on its being shewn that he had given security upon his appointment as guardian, to the satisfaction of a Court in the State where he and the infants resided. The insurance company were discharged upon payment to the trustee of the moneys in their hands. *Re Andrews*, 199.

4. *Infant—Next friend—Appeal—Indemnity against costs.*—An order was made indemnifying the next friend of the infant plaintiffs out of their money for the costs of an appeal to the Supreme Court of Canada, where the appeal was advised by more than one counsel, and one of the Judges of the Court of Appeal had dissented from the rest. *Cottingham et al. v. Cottingham*, 13.

5. *Infant's allowance—Past maintenance—Encroaching on principal.*—Where an allowance for past

maintenance of infants is sought out of the infants' estate, it is a rule that the principal is not to be encroached upon, unless for unavoidable reasons falling little short of necessity; and the Court will not sanction a higher allowance for past expenditure than would have been awarded for maintenance if a prior application had been made therefor.

Where the aggregate amount of principal of the estate of five infants was \$11,250, the Master allowed their mother \$9,504 for five years' past maintenance, but *BOYD, C.*, on appeal reduced the amount to \$6,600. *Crane v. Craig*, 236.

See COSTS, 11—HABEAS CORPUS.

INJUNCTION.

See JUDGMENT, 2.

INSURANCE.

*Insurance—Benevolent Society—*47 Vic. ch. 20 (O.)—The statute 47 Vic. ch. 20 (O.), does not apply to Benevolent Societies incorporated under R. S. O. ch. 167. *Re O'Heron*, 422.

See INFANT, 3.

INTEREST.

See JUDGMENT, 7—RAILWAY, 3.

INTERIM ALIMONY.

Interim alimony—Desertion—Occupation of homestead by wife—Interim disbursements—Counsel fee

—Solicitor as counsel.—An order of a Local Master directing the defendant in an alimony action based upon desertion to pay interim alimony, was affirmed, though the wife was in occupation of the defendant's homestead; she having established that she was in need of interim alimony, and the defendant not shewing that she was in receipt of any income from the farm.

An order directing the defendant to pay forthwith interim disbursements was affirmed, except as to the counsel fee to be paid to the plaintiff's solicitor, who intended to act as counsel at the trial. *Lalonde v. Lalonde*, 143.

INTERPLEADER.

1. *Interpleader—Sale of goods—Gross proceeds to be paid into court by sheriff.*—The gross proceeds of a sale of goods in an interpleader matter should be paid by the sheriff into Court without deducting anything for his expenses. *Ontario Bank v. Revell*, 249.

2. *Interpleader—Claimants—Attaching creditors—Appeal.*—Held, following *Leech v. Williamson*, 10 P. R. 226, that attaching creditors may be "claimants" within the meaning of the Interpleader Act.

Although *Macfie v. Pearson*, 8 O. R. 745, in effect decides that the execution creditor, who has seized before process against the defendant as an absconding debtor has issued, is to be paid in priority, yet that decision having been rendered by consent in a summary way, is not binding upon the claimants in this case, who may choose to litigate upon issues which can be carried to

appeal. *Standard Insurance Co. v. Hughes*, 220.

3. *Adverse claims—Right to interplead—Summary application—Chancery practice—Sec. 17, sub-sec. 6, and rule 2, O.J.A.—Payment into Court—Costs—Indemnity—Staying action.*]—The plaintiff J. P. and one E. T. severally claimed from the defendants payment of the moneys due under a certain certificate of membership issued by the defendants to T. P., deceased, the plaintiff claiming as administrator *pendente lite* of T. P., J. P. claiming that the certificate had been indorsed to her by the deceased, and E. T. as administrator. It appeared that a duplicate certificate had issued to T. P. upon his alleging that he had lost the one originally issued. The defendants were always willing to pay any one who might be entitled, and upon this action being brought applied for an interpleader order in respect of the adverse claims. J. P. did not appear in answer to the application, and her claim was barred, and the money ordered to be paid to E. T. upon certain terms. Upon an appeal by E. T. from this order it was

Held, that there was a right to interpleader upon a summary application, either under sec. 17, sub-sec. 6, O. J. A., or under the former practice of the Court of Chancery. Rule 2, O. J. A., does not extinguish any right to interplead that formerly existed; it regulates the practice only, and enables a defendant to obtain relief upon a summary application, where formerly it would have been necessary to file a bill.

Held, also, that the defendants were entitled to their costs of the action and application, and to retain them out of the funds in their hands,

and that the balance should be paid to E. T. instead of into Court, as the other claimant had withdrawn, upon E. T. indemnifying the defendants against the production of the original certificate, and that the action should be stayed. *McEltheran v. The London Masonic Mutual Benefit Association*, 181.

4. *Interpleader—Divisional Court—Appeal from County Court—44 Vic. ch. 7, (O.)*]—An interpleader issue arising out of an action in the Chancery Division of the High Court of Justice was sent to a County Court for trial by order made in Chambers.

Held, that it was to be intended that the order was made under 44 Vic. ch. 7, (O.), rather than under the interpleader jurisdiction of the old Court of Chancery; and that being so, that a Divisional Court of the High Court of Justice had no jurisdiction to hear an appeal from the judgment of the County Court on such issue, and that such appeal should have been to the Court of Appeal under R. S. O. ch. 54, sec. 23. *Close v. Exchange Bank*, 186.

5. *Interpleader—Material upon which order granted—Who should be plaintiff in issue when goods seized in claimant's possession.*]—Interpleader orders should be granted with extreme caution and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession, by an affidavit of the belief of the Sheriff, if he has such belief, and by a similar affidavit of the execution creditor.

A Sheriff, instructed by the execution creditor, went to the store which had been the defendant's, found the claimants in possession

and their name over the door, and notwithstanding this, and without further inquiry, made a seizure. Upon a claim to the goods being made, the Sheriff applied for an interpleader order, swearing positively that the seizure was of goods and chattels belonging to the defendant. It was admitted that the defendant had made an assignment of all his property before the seizure.

Held, that an interpleader order should not have been granted, and an order was made barring the execution creditor.

Seemle, that if the claimant be in possession at the time of the seizure, the execution creditor should be plaintiff in the interpleader issue. *Duncan et al. v. Tees*, 66.

(But see the same case, p. 296.)

6. *Interpleader issue—County Court—Motion to postpone trial—44 Vic. ch. 7, sec. 1, (O.)*—An interpleader issue arising out of an action in the High Court of Justice was directed to be tried in a County Court pursuant to 44 Vic. ch. 7, sec. 1, (O.)

Held, that a motion to postpone the trial of the issue should have been made in the County Court. *London and Canadian Loan and Agency Company v. Morphy*, 86.

See PARTIES, 1.

JOINDER OF ISSUE.

See NOTICE OF TRIAL.

JUDGE IN CHAMBERS.

See ARREST, 3—JURY NOTICE, 1—VENUE, 2.

JUDGE AT TRIAL.

See EVIDENCE.

JUDGE IN COURT.

See REFEREE (OFFICIAL.)

JUDGMENT.

1. *Judgment—Revivor—Statute of Limitations—Scire facias.*—Judgment was recovered in 1856. On the 23rd of October, 1869, an order was made by a Judge in Chambers to revive by entering a suggestion on the roll under the C. L. P. Act, and the suggestion was entered on the 22nd January, 1870, but no execution issued after that date. On the 6th December, 1884, an order was made under Rule 356, O. J. A., for leave to the plaintiff to issue execution.

Held, that the entry of a suggestion under the C. L. P. Act was a judgment of the Court and gave a new starting point for the Statute of Limitations to run from, and that the period of limitation in the case of judgments in personal actions is twenty years under R. S. O. ch. 61, and not ten years under R. S. O. ch. 128, which relates to judgments as liens on land.

Allan v. McTavish, 2 A. R. 278, and *Boice O'Loane*, 3 A. R. 167, commented on and followed.

Quære, per ROSE, J., whether there is any period fixed by the statute beyond which the Court may not have the power to allow execution to be issued. *McCullough v. Sykes et al.*, 337.

2. *Interlocutory judgment—Irregularity—Claim for injunction—*

Rule 75.]—The endorsement on the writ of summons claimed, in addition to pecuniary damages, an injunction restraining the defendants from disposing of certain goods.

Held, that interlocutory judgment signed by the plaintiff for default of appearance was irregular, and should be set aside. *McCallum v. McCallum*, 16.

3. *Division Court — Jurisdiction — Setting aside judgment — Time — Rule 270, O. J. A.*]—The Judge of a Division Court has no jurisdiction to set aside a judgment after the expiry of fourteen days from the trial.

Although the defendant has fourteen days to move against a judgment in the Division Court, it is proper for the plaintiff to enter judgment and issue execution forthwith, unless restrained by the Judge to a future named day.

The practice under Rule 270, O. J. A., is not applicable to Division Courts. *Re Foley v. Moran*, 316.

4. *Judgment under Rule 80, O. J. A. — Delivery of statement of claim.*]—The practice of moving under Rule 80, O. J. A., for leave to enter final judgment after delivery of a statement of claim is not one to be encouraged, although in cases of necessity it may be allowable.

Under the circumstances of this case, motion for judgment was refused. *Woodruff v. McLennan*, 22.

5. *Service out of Ontario — Debts — Assets in Ontario — Rule 45 (e), O. J. A.*]—Debts owing to the defendant from persons living in Ontario are assets in Ontario which may be rendered liable to the judgment,

within the meaning of Rule 45 (e), O. J. A. *Purves v. Slater*, 507.

6. *Judgment — Appeal — Certificate — Garnishee — Payment over — Restitution — 45 Vic. ch. 6 (O.)*]—An appeal from the order of a County Judge directing payment over to the plaintiff by a garnishee of moneys in his hands was allowed by this Court in a former judgment (10 A. R. 17.)

It appeared that the garnishee had paid over the moneys in his hands before the appeal was initiated.

Held, that the certificate of the former judgment properly contained an award of restitution of the money so paid, which the Court had authority to make under 45 Vic. ch. 6 (O.) *McKindsey v. Armstrong*, 200.

7. *Signing judgment — Interest — Duty of Clerk.*]—In an action on a promissory note the plaintiffs, in their statement of claim, claimed interest at the rate of seven per cent. without shewing any legal right to more than six per cent. The statement of defence having been held bad on demurrer, and leave to amend not having been asked or granted, the plaintiffs entered judgment for default of defence for the full amount of the principal and interest claimed.

Held, that it was the duty of the deputy clerk at the office where judgment was signed not to permit judgment to be entered for what the plaintiffs were not entitled to, and that there was no objection to the plaintiffs limiting their claim to six per cent. on signing judgment. *Bank of Hamilton v. Harvey*, 145.

8. *Married woman — Judgment — R. 80, O. J. A. — 47 Vic. ch. 19 (O.)*—*Held*, that the “Married Women’s Property Act, 1884,” (47 Vic. ch. 19, O.) is not retrospective.

A motion under Rule 80, O. J. A., for judgment upon a promissory note against a married woman was dismissed in April, 1883, and was now renewed, fourteen months after the passing of the Act of 1884.

Held, that that Act made no change in the law which could assist the plaintiff, even if the matter were *res integra*.

Turnbull v. Forman, 15 Q. B. D. 234, followed. *Scott v. Wye et al.*, 93.

9. *Judgment by default at trial—Motion to set aside—Jurisdiction of Judge as the Court—Rules 214, 270, O. J. A.*—The Judge who presides at the trial, and pronounces judgment by default for the defendant in the absence of the plaintiff, has power under Rule 270, O. J. A., when afterwards sitting as the Court at Toronto, to set aside such judgment.

Hilliard v. Arthur, 10 P. R. 281, distinguished. *Ross v. Carscallen*, 104.

See INDIAN—MASTER IN CHAMBERS, 2 — PATENT, 2 — SOLICITOR'S LIEN, 3.

JURISDICTION.

By-law—Application to quash—Divisional Court—Single Judge.—The Divisional Court ought not to entertain applications to quash by-laws, which should be made to a single Judge. *Landry v. The Corporation of the City of Ottawa*, 442.

See ARREST, 1, 2, 3—COSTS, 1—EVIDENCE — JUDGMENT, 9 — JURY NOTICE, 4—MASTER IN CHAMBERS, 1, 2—MASTER IN ORDINARY, 1—MORTGAGE, 1—PARTITION, 2—PROHIBITION, 1, 2, 3, 4, 5—QUO WARRANTO—VENUE, 5.

JURY.

Will — Cause transferred from Surrogate Court—Jury — Heir-at-law—Sec. 45, O. J. A.—The Court of Chancery had, before the O. J. A., exclusive jurisdiction in actions to establish wills, and its power to direct a trial by jury (R. S. O. ch. 40, sec. 99), is continued in the High Court under sec. 45, O. J. A. But the heir-at-law, the defendant, in such an action has not now in this Province an absolute right to a jury, and the Court refused to direct one on the issues raised herein. *Re Lewis—Jackson v. Scott*, 107.

See CROSS-ACTIONS, 1

JURY NOTICE.

1. *Jury notice—Issue—Account—R. S. O. ch. 50, sec. 255.*—The action was for the amount of a bill for medical attendance; no equitable issue was raised, and it clearly appeared that the only matter in dispute was the amount of the bill: *Held*, a proper case for a Judge in Chambers, under R. S. O. ch. 50, sec. 255, to strike out the jury notice. *Pickup v. Kincaid et al.*, 445.

2. *Action in Chancery Division—Jury Notice—Transferring action.*—The order of *Boyd, C.*, 10 P. R. 574, reversed by the Divisional Court, following *Pawson v. The Merchants Bank*, 11 P. R. 72. *Masse v. Masse*, 81.

3. *Jury notice—Cause of action—Injunction—Reference—Burden of proof—Cross-action—Counterclaim—Staying proceedings.*—C. & M. were contractors for building the Canadian Pacific Railway, and sued

the company for \$200,000, the balance alleged to be due upon their contract, the writ in their action having issued on the 5th October, 1885, in the Queen's Bench Division. On the 31st October, 1885, the railway company began an action in the Chancery Division against C. & M., to recover \$600,000, alleged to have been over-paid them, setting up that the measurements and progress certificates on which the payments were made had been obtained by fraud, and seeking the cancellation of these certificates, and an injunction to restrain the contractors from receiving a final certificate. The company did not counter-claim in the action brought by C. & M., and the latter delivered a jury notice in the action in the Chancery Division.

The Master in Chambers struck out the jury notice, and, on application by each party to stay the other's action, ordered the contractors' action to be stayed, but allowed the company's action to proceed. On appeal from these orders by the contractors, *Boyd, C.*,

Held, that the action of the company was one which, as of course, would have been begun prior to the Judicature Act by a bill in Chancery, although it might have been possible to recover in a common law forum; it was also a case in which it was to be expected that a reference to take the accounts would be directed at some stage, and that difficult and complicated questions of law and fact would arise at the trial, which could be much better dealt with by a Judge than a jury; he therefore dismissed the appeal from the order striking out the jury notice.

Held, also, that, as there was a large burden of proof upon the company, and no vexation or impropriety in their seeking to unravel

the alleged fraudulent transactions, and as they were not advancing a counter-claim in the action brought by C. & M., the company's action should not be stayed till the final determination of the other action, but that the trial of the company's action was the proper preliminary step in endeavouring to adjust the rights of the parties, and should take place first.

Taylor v. Bradford, 9 P. R. 350, distinguished.

Rose, J., also dismissed the appeal from the order staying the contractors' action. *Connée et al. v. Canadian Pacific R. W. Co.*—*Canadian Pacific R. W. Co. v. Connée et al.*, 149. [Reversed in C. A., 12 A. R. 744.]

4. *Jury notice—Rule 545—Transferring causes—Exclusive jurisdiction of Chancery.*—In an action brought in the Chancery Division, on behalf of the plaintiff and other creditors, to set aside an alleged fraudulent transfer of notes, &c., made to the defendants by the debtor, and for an injunction to restrain the defendants from negotiating them, the defendants served a jury notice, which the Master in Chambers refused to strike out. On appeal to *PROUDFOOT, J.*, he allowed the appeal and struck out the notice, reserving leave to appeal to the Court of Appeal.

Held, that Rule 545, O. J. A., was not intended to, and does not, interfere with the power of transferring actions from one Division of the High Court to another, nor with the right to give a jury notice in a proper case, nor with the existing modes of trial of particular actions.

Held, also, that the exclusive jurisdiction of the Court of Chancery in sec. 45 means its jurisdiction as

exercised generally in dispensing equity, and not its exclusive as distinguished from its auxiliary jurisdiction.

Held, lastly, that this was such an action as would, before the Judicature Act, have been within the exclusive jurisdiction of the Court of Chancery, and therefore it fell within sec. 45, and should be tried without a jury.

The practice as laid down in *Bank of B. N. A. v. Eddy*, 9 P. R. 468, is still the proper practice.

The question whether the order of PROUDFOOT, J., was appealable was not determined, as the appeal was dismissed. *Pawson et al. v. The Merchants' Bank of Canada et al.*, 72.

5. *Action in Chancery Division—Jury notice—Transferring action.*]—In an action for the price of goods sold and delivered, which was begun in the Chancery Division, the defendant's jury notice, which had been struck out, was restored and the action was transferred to the Queen's Bench Division.

Masse v. Masse, 10 P. R. 574, not followed, owing to the judgment of the Court of Appeal in *Pawson v. The Merchants Bank*, *supra*, 4. *Herring v. Brooks*, 15.

6. *Municipal councillors—Misconduct—Trustees—Equitable jurisdiction—Jury notice—Parties.*]—Action by two ratepayers on behalf of themselves and all other ratepayers of A. against all the members of the Municipal Council of A., charging that the defendants, acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further

moneys, causing loss to the municipality.

Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustees;" that the action was one in the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper.

Semble, the municipal corporation should have been made a party to the action, and the action should have been on behalf of all ratepayers *except the defendants*. *Morrow et al. v. Connor et al.*, 423.

LIBEL.

See COSTS, 2—COUNTER-CLAIM—EXAMINATION, 8—PRODUCTION, 5.

LIEN.

See SOLICITOR'S LIEN.

LEGATEE.

See ADMINISTRATION.

LIS PENDENS.

Lis pendens—Vacating registration.]—Action by a creditor of M. to set aside a conveyance by M. to his wife, as fraudulent.

Held, a proper case in which to register a certificate of *lis pendens*, and that pending the action no order could be made to vacate it. *Foster v. Moore et al.*, 447.

LIMITED DEFENCE.

Limited defence — Appearance — Statement of claim—Rule 68, O. J. A.—In an action for foreclosure the defendant entered an appearance under Rule 68, O. J. A., limiting his defence to one item in the particulars indorsed on the writ of summons. The appearance did not state that the defendant did not require the delivery of a statement of claim.

Held, that after such appearance a statement of claim was unnecessary, and a judgment signed upon it, for default of a statement of defence, was set aside, with costs. *Peel v. White*, 177.

LOCAL REGISTRAR.

See APPEAL, 2.

LOCAL JUDGE.

See ARREST.

LOCAL MASTER.

See COSTS, 7.

LUNATIC.

Lunatic — Maintenance — Money in Court.—Money in Court to the credit of a lunatic, though not so found, was directed to be paid out in annual sums for his maintenance. *Re Hinds, Hinds v. Hinds*, 5.

MAGISTRATE.

See WITNESS.

MAINTENANCE.

See INFANT, 5—LUNATIC.

MARRIED WOMAN.

See EXAMINATION, 6—JUDGMENT, 8.

MASTER IN CHAMBERS.

1. *Controverted election—Municipal Act, 1883, (O.)—Master in Chambers, jurisdiction of—Acquiescence.*—The Master in Chambers is not in any sense, by delegation or otherwise, a Judge of the High Court of Justice to whom power is given by the Municipal Act, 1883, to try and determine cases of controverted municipal elections; nor can such power be given him by the acquiescence of the parties. *Regina ex rel. Wilson v. Duncan*, 379.

2. *Order after action dismissed—Statement of claim—Extending time—Master in Chambers, jurisdiction of—Rule 462, O. J. A.*—An order of the 4th October, 1886, extended the time for the delivery of statement of claim till the 12th October, but provided if it was not so delivered, the action should stand dismissed with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action.

Held, that notwithstanding the dismissal of the action, an order could properly be made under Rule 462 vacating the judgment, and further extending the time for delivering the statement, and the Master in Chambers had jurisdiction to make such an order. *Newcombe v. McLuhan*, 461.

See APPEAL, 9, 12—QUO WARRANTO.

MASTER IN ORDINARY.

1. *Master in Ordinary, jurisdiction of—Consolidating actions—Judgment.*—The Master in Ordinary has no jurisdiction to consolidate actions in which judgments have been entered, and in which references are pending in his office. *Boswell v. Grant et al.*, 373.

2. *Master's Office—Admissions—Memorandum in writing.*—Admissions made before the Master in the course of a reference should be put into writing and signed by the party making the same. *Foster v. Allison*, 233.

See PARTITION, 2.

MASTER'S OFFICE.

See COMMITTAL.

MECHANIC'S LIEN.

See COSTS, 4.

MORTGAGE.

1. *Division Court—Prohibition—Equitable claim—Surplus in hands of mortgagee.*—A Division Court has jurisdiction to entertain a claim for less than \$100 made by a mortgagor upon the surplus proceeds of a mortgage sale which realized less than \$400. Such a claim is an equitable cause of action for money had and received. *Re Legarie et al. v. The Canada Loan and Banking Co.*, 512.

2. *Mortgage—Sale under power—Surplus—Account as to—Scale of*

costs—R. 515, O. J. A.—The order of PROUDFOOT, J., 10 P. R. 636, affirmed by the Divisional Court. *Morton v. Hamilton Provident and Loan Society*, 82.

See CROSS-ACTIONS, 1 — SOLICITOR'S LIEN, 2—VENUE, 3.

MOTION.

See CONTEMPT OF COURT, 1.

MUNICIPAL COUNCILLOR.

See JURY NOTICE, 6.

MUNICIPAL ELECTION.

See MASTER IN CHAMBERS, 1—QUO WARRANTO.

NEXT FRIEND.

See INFANT, 4.

NOT GUILTY.

See PARTICULARS, 1.

NOTICE.

See APPEAL, 4 — VENDOR AND PURCHASER, 1.

NOTICE OF APPEAL.

Notice of appeal—Effect of.—A notice of appeal to the Court of Appeal is not an initiation of the appeal.

Where notice was served, but the security required by sec. 38, O. J. A., was not given,

Held, that there was no appeal pending, and a motion to set aside the notice of appeal, or to dismiss the appeal, was dismissed. *Smith v. Smith et al.*, 6.

NOTICE OF TRIAL.

1. *Notice of trial—Plaintiffs severing—Rule 255, O. J. A.*—Since the Ontario Judicature Act any one of the parties, plaintiffs or defendants, may give notice of trial. *Tinning et al. v. Grand Trunk Railway Company*, 438.

2. *Notice of trial—Joinder—Close of pleadings—Counter-claim.*—The plaintiff delivered a simple joinder of issue upon the statement of defence and counter-claim.

Held, that this closed the pleadings, and that notice of trial served with it was regular. *Hare v. Cawthrope*, 353.

OFFICIAL GUARDIAN.

See Costs, 11.

PARTICULARS.

1. *Defence—Not guilty by statute—Particulars.*—Where the plaintiff was not aware of the defence intended, qualified particulars of a defence of not guilty by statute were ordered. *Jennings v. The Grand Trunk Railway Company*, 300.

2. *Slander—Particulars—Examination.*—An order for particulars, under the statement of claim in an

action of slander, of the names of the persons to whom the alleged slander was spoken, was rescinded because the examination of the plaintiff gave to the defendant all the discovery that he sought to obtain by the order for particulars.

Semble, in actions of slander the practice laid down in *Thornton v. Capstock*, 9 P. R. 535, as to particulars to be furnished, should be followed in preference to that prevailing in England. *Gould v. Beattie*, 329.

See PATENT, 1—*PRODUCTION*, 3.

PARTIES.

1. *Adding parties—Rules 103 (a) and 108, O. J. A.*—The plaintiff and P. both claimed to be entitled by assignment to a mortgage made by the defendant. The defendant paid P. one gale of interest and received indemnity for the amount paid against any claim on the part of the plaintiff. The plaintiff then brought this action claiming the interest which had been paid to P., and also the principal for default in payment of interest. The defendant applied to have P. added as a co-defendant.

Held, not a proper case for adding P. as a party under Rule 103 (a), but rather one in which a notice might be served upon P. by the defendant under Rule 108, O. J. A.

Quære, per the MASTER IN CHAMBERS, whether the defendant had not a remedy by interpleader. *Hewitt v. Heise*, 47

2. *Adding parties—Rule 109, O. J. A.—Pleading.*—In an action for the price of goods sold, C., to whom the defendant had paid the price of the goods, believing him and not the

plaintiff to have the title thereto, and J. C. F. and A. F., who were charged by C. with having fraudulently obtained possession of the goods and made a pretended sale of them to the plaintiff, were added as defendants under Rule 109, O. J. A., with a direction that C. should in his pleading state his case against J. C. F. and A. F., and that they should be at liberty to reply *Brown v. Cousineaux*, 363.

See JURY NOTICE 6.

PARTITION.

1. *Partition — Sale — Dowress — Assignment of dower.*—A person entitled only to dower, unassigned, out of land, is entitled to apply for partition.

Rody v. Rody, 1 C. L. T. 146, overruled.

But where one only of several is desirous of partition, all that that one is entitled to is to have his or her portion set aside, leaving the others to hold jointly or in common, as before.

Hobson v. Sherwood, 4 Beav. 184, followed.

And where the dowress applied for partition or sale, confessedly with the object of obtaining the latter, and all the other parties opposed it, and it appeared that the applicant had by another proceeding obtained the right to have her dower assigned out of the lands, the application was refused, with costs. *Devereux v. Kearns et al.*, 452.

2. *Master's Office — Jurisdiction — G. O. Chy. 640 — Reference under order of Master in Chambers — Disputed lease — Fraud — Trial of issue — Rule 256, O. J. A. — Who should*

be plaintiff.] — *Held*, that on a Chamber reference for partition or sale of lands made by the Master in Chambers, the Master in Ordinary has no jurisdiction to try the question of the validity of a lease under seal from the intestate, set up as a ten years' lease by one of the heirs-at-law, who claimed that the lands should be sold subject to his lease, some of the other heirs-at-law disputing the validity of the lease, and alleging that it was either a five years' lease, or that there had been a fraudulent alteration of the sealed instrument, there being an alteration in a material part apparent on the face.

The reference was adjourned till after the trial of the question raised, and an issue was directed by a Judge in Chambers under Rule 256, O. J. A., to be tried at the next sittings for the trial of actions in the Chancery Division; the lessee to be plaintiff in the issue. *Re Rogers — Rogers et al. v. Rogers et al.*, 90.

PARTNERS.

See EXAMINATION, 9.

POUNDAGE.

See SHERIFF.

PATENT.

1. *Patent suit — Particulars — 35 Vic. ch. 26, sec. 24 (D.)*—In an action for infringement of a patent the defendants denied (4) the novelty of the invention, and (6) that the plaintiff was the first and true inventor.

Held [Boyd, C., dissenting], that the defendants should deliver particulars under these defences, shewing in what respects the defendants deny that the plaintiffs' patent was for any new machine, &c., and the dates and occasions when, and also the names of the persons by whom the prior user was had.

Per BOYD, C.—In the absence of any legislation or rules of court upon the subject, the Judge has no power or right to prescribe so minutely what shall be disclosed in the particulars. The statute 35 Vic. ch. 26, sec. 24 (D.) goes no further than to justify such general order for particulars as is usual in other cases.

Mills v. Scott, 5 U. C. R. 360, discussed. *Smith et al. v. Greey et al.*, 169.

2. *Patent action—Measure of damages—Form of judgment—Pleadings.*—In a patent action the judgment of the Supreme Court of Canada declared that the plaintiffs were entitled to an inquiry and to be paid the amount found due upon such inquiry for damages sustained from the making, constructing, using, selling, or vending to others to be used, by the defendants, and by the persons to whom they have sold, given, or let the same, of any of the machines, &c.

The judgment gave relief beyond what the plaintiffs asked by their bill of complaint.

Held, that where the language of the decree is unambiguous, the allegations in the pleadings should not be taken into account in the inquiry as to damages, and therefore the Master was wrong in excluding evidence of damages to the plaintiffs by the use of machines by persons who had bought them from the defendants. *Smith et al. v. Goldie et al.*, 24.

PAYMENT OUT OF COURT.

See APPEAL, 6—INFANT, 1.

PAYMENT INTO COURT.

See COSTS, 22.

PLEADING.

See ARREST, 2—DOWER — EXAMINATION, 1—PARTICULARS, 1—PARTIES, 2—PATENT, 2—STATEMENT OF DEFENCE.

PRIVILEGE.

See PRODUCTION, 1, 2, 3, 5, 6.

PRODUCTION.

1. *Production of documents — Material on motion for better production—Privilege.*—Upon a motion for a better affidavit of documents from the defendants the Merchants' Bank, the plaintiffs were allowed to read the depositions of an officer of the bank, taken for use upon a previous motion in the action.

G. was general solicitor for the Bank, and was actively engaged in negotiating the transaction impeached in the action, not only on behalf of the Bank but on behalf of himself and of other persons.

Held, that letters written to the Bank by G. in reference to the transaction in question were not privileged from production. *Pawson et al. v. The Merchants' Bank et al.*, 18.

2. *Discovery — Fraud — Will—Subsequent dealings with estate—Examination — Rule 235, O. J. A.—Production—Privilege—Solicitor.*]

In this action the plaintiff, in her statement of claim, charged her brother the defendant D. M. McD., with inducing her father to make a will in her mother's favour, with the fraudulent design on the part of D. M. McD. of obtaining the whole estate for himself, and charged that her father was induced to make the will by fraudulent misrepresentations, and that after her father's death, D. M. McD. obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife, and prayed to have the will set aside. D. M. McD., in his examination for discovery before the trial, admitted receiving the power of attorney from his mother after his father's death, and dealing with the estate under it, but denied having used any portion of the estate for his own purposes.

Held, that although what took place after the father's death was no proof of the fraudulent design, it might throw light upon it; and although the plaintiff was entitled to know generally what dealings the defendant D. M. McD. had with the estate, and to interrogate D. M. McD. upon his examination before the trial, as to whether he had invested all the moneys of the estate in his own or his wife's name, yet a general inquiry as to his dealings with each part and parcel of the estate, or as to what property came into his hands under the power of attorney, should not be permitted.

The O. J. Act has introduced a new intermediate practice, departing in some measure from the old rules

of Chancery and Common Law, such new practice being indicated by Rule 235; that where a question has been substantially answered, a further answer ought not to be compelled, and when discovery would be oppressive, it is the duty of the Court to exercise its discretion by refusing discovery, as also where the discovery cannot possibly help the plaintiff to obtain a decree.

Parker v. Wells, 18 Ch. D. 477, considered and followed.

The defendant D. M. McD. claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant, F. McD.

No order to produce had at the time of the application been taken out as against F. McD., nor had she been served with notice of the application.

Held, that D. M. McD. should not have been ordered to produce these documents, without F. McD. being called upon to show cause why they should not be produced. *MacGregor v. McDonald et al.*, 386.

3. *Fraud—Production of documents—Privilege — Particulars.*]

In an action to recover back payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiffs' line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent;

Held, that documents shewing the results of measurements and surveys made by the plaintiffs for the purpose of litigation were privileged from production, even if they were procured for the purposes of another action between the same parties; but,

Held, that information obtained by means of the measurements and examination of the company's surveyors was not *per se* privileged; and the plaintiffs were therefore ordered to give particulars of the errors in the certificates on which they relied, although this might involve the disclosing of matters of fact derived from privileged communications. *Canadian Pacific Railway Company v. Conmee et al.*, 297.

4. *Production of documents—Better affidavit—When ordered.*]—The usual affidavit on production of documents, made by an officer of the defendants, contained a statement that the defendants objected to produce their repairs book and train register, but that they would produce such portions of the books "as are relevant, for inspection at the offices of the company;" and a further statement, that the company "had sealed up such parts of the said books as do not relate to the matters in question in this action." At the trial the plaintiff called as witnesses, the train despatcher, locomotive engineer, and an engine driver of the defendants. The presiding Judge refused on the evidence then given to direct the books to be unsealed.

Held, reversing the order of Rose, J., 10 P. R. p. 553, that the facts of the case shewed a right in the plaintiff to have these books of the company produced.

Even against a party's own affidavit, if the Court is reasonably certain that he has erroneously represented or misrepresented the nature of documents, a further affidavit on production will be ordered.

The rule laid down in *Jones v. The Monte Video Gas Co.*, 5 Q. B.

D. 556, may be accepted as the general rule on the subject of the production of documents, but it should be read in conjunction with *The Attorney General v. Emerson*, 10 Q. B. D. 191. *Moxley v. The Canada Atlantic Railway Company*, 39.

5. *Production—Privilege—Affidavit of documents—Criminal libel.*]—To obtain privilege for a document mentioned in an affidavit on production, the grounds upon which it is claimed must be stated.

A statement that according to plaintiff's contention a document contains a libel, and therefore exposes the defendant to a criminal charge is not sufficient to protect the document; the defendant must go further and express his belief that the production of the document will expose him to a criminal charge. *Bromley v. Graham*, 451.

6. *Production of documents—Letters—Reference to Solicitors' advice—Privilege.*]—Letters written to the defendant company by a clerk who was specially instructed to investigate the plaintiff's accounts and take the advice of the company's solicitors, and which contained references to their advice, were *held* privileged from production.

Semble, a second application for a better affidavit of documents is improper, where no objection is made on the first application to the non-production of the documents in question, the second motion not being made upon any materials which did not exist at the time of the first motion. *Boughton v. The Citizens Insurance Company et al.*, 110.

See SPECIAL EXAMINER.

PROHIBITION.

1. *Prohibition—Division Court—Splitting amount to give jurisdiction—R. S. O. ch. 47, sec. 59—Ascertainment of amount.*—The defendant rented certain premises from the plaintiff for a year, agreeing in writing to pay monthly \$125 therefor, but no formal lease was executed. When the rent had become four months in arrear the plaintiff entered three plaints in a Division Court against the defendant, each for a month's rent, \$125.

Held, that the sums claimed in the three plaints were payable under the one contract, and would have been included in one count under the old system of pleading; and, therefore, that the division into three plaints was improper under R. S. O. ch. 57, sec. 59.

Held, also, that the defendant's signature to the memorandum of lease could not be construed as ascertaining the amounts claimed in the plaints; and prohibition was ordered. *Re Gordon v. O'Brien*, 287.

2. *Prohibition—Division Court—Chattel or fixture—Title to land—Jurisdiction.*—The plaintiff sued in a Division Court for the conversion of a mirror, which the defendant contended was annexed to the freehold and had passed to him therewith. The judge of the Division Court found that the mirror was a chattel, and gave judgment for the plaintiff.

Held, [reversing the decision of O'Connor, J., who had directed a writ of prohibition to issue] that the judge of the Division Court having found as a fact that the mirror was a chattel, his decision should not be interfered with by way of prohibition. *Re Bushell v. Moss*, 252.

3. *Division Court—Prohibition—Costs of application for writ—Entitling of affidavits—O. J. A. secs. 23-25—Amendment—Rule 474.*—Where a defendant, upon being sued in the First Division Court in the county of Middlesex, filed a notice disputing the jurisdiction and served a notice of motion returnable before a Judge in Chambers, for an order directing the issue of a writ of prohibition to the said Division Court, to prohibit the Judge thereof and the plaintiff from proceeding with the suit in that Division Court on the ground of want of jurisdiction in that Court to hear and determine the same, but did not entitle his notice of motion, nor the affidavit filed in support of the motion, in any Division of the High Court of Justice;

Held, affirming the order of O'CONNOR, J., in chambers, granting the writ, not a fatal objection, but one which could and should be amended under Rule 474, O. J. A.

Held, also, that, although before the motion for prohibition came on to be heard the plaintiff in the Division Court caused the plaint to be transferred to the proper Division Court in the county of Lambton, nevertheless the defendant, upon being sued in a wrong Division Court, had the right to apply for prohibition, and the Judge in Chambers having in his discretion given the defendant the costs of the motion for prohibition, that discretion could not be interfered with. *Re Olmstead v. Errington*, 366.

4. *Prohibition—Division Court—Liquidated and unliquidated amounts—49 Vic. ch. 15, sec. 6 (O.)*—A claim aggregating more than \$100 and less than \$200, which is made up of two amounts, one liqui-

dated and one unliquidated and both less than \$100, cannot be sued in a Division Court.

Per ARMOUR, J.—The claims could not have been sued together before 49 Vic. ch. 15, sec. 6 (O.), and that Act does not expressly or impliedly affect the question.

Per O'CONNOR, J.—But for 49 Vic. ch. 15, sec. 6 (O.), the case would be governed by *Vogt v. Boyle*, 8 P. R. 249. It must be assumed that the legislature intended by that enactment to lay down a rule of combination to regulate the whole subject; and the enactment being silent as to the combination of such claims as are here sued on, they must be taken to be excluded from the jurisdiction. *Re Walsh v. Elliott*, 520.

5. *Prohibition — Division Court — Action on County Court judgment.*—The judgment of GALT, J., 10 P. R. 257, reversed. *Re Eberts et al. v. Brooke*, 296.

See CONTEMPT OF COURT, 2—IMPRISONMENT FOR DEBT — MORTGAGE, 1.

PROSECUTION.

See ACTION—WITNESS.

QUO WARRANTO.

Municipal election—Quo Warranto—Master in Chambers, jurisdiction of—Time—Qualification—Married woman—Municipal Act, 1883, (O.)—The jurisdiction of the Master in Chambers to grant a *quo warranto* summons under the Municipal Act, 1883, (O.), is established

by the 13th sec. of the A. J. Act, 1885.

A summons issued within a month after the formal acceptance of office by taking the statutory declarations of qualification and office is in time, notwithstanding that it issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent at a meeting of electors, and certain other acts of a similar character, less formal than the statutory declarations.

The respondent was rated on the assessment roll in respect of a leasehold property, sufficient in value to qualify him for office, but the property of his wife, to whom he was married in 1872, and who acquired the property in 1884.

Held, that the respondent had no estate or interest in the property, and therefore was not qualified for office under sec. 73 of the Municipal Act, 1883, (O.) *Regina ex rel. Felitz v. Howland*, 264.

RAILWAY.

1. *Expropriation of lands by Railway—Appeal from award — Procedure—Ontario and Dominion Railway Acts.*—Certain land was expropriated by the defendants in 1876, and proceedings to obtain compensation therefor were begun in 1884. On the 25th May, 1883, the defendants' railway became by Statute a Dominion (having previously been an Ontario) road.

Held, that the procedure provided by the Dominion Consolidated Railway Act, 1879, applied to the proceedings, and therefore that an appeal under the provisions of the Revised Ontario Railway Act could

not be prosecuted. *Darling v. The Midland Railway Company*, 32.

2. *Railways — Expropriation of lands—Order for immediate possession—47 Vic. ch. 11, sec. 12 (D.)*—Immediate possession of land, alleged to be necessary for the purposes of a railway, should not be granted to the railway on summary process under the Railway Act unless two points are very clearly established: First, that the company has an indisputable right to acquire the land by compulsory proceedings; and, second, that there is some urgent and substantial need for immediate action; and inasmuch as these points could not be said to have been clearly established by the affidavits and arguments in this present case, the Court declined to interfere summarily, and dismissed the application of the railway company for a warrant to enter forthwith upon the lands.

Quere, as to power of Judge to award costs directly under the Statute, 47 Vic. ch. 11 (D.) *Re Kingston and Pembroke Railway Company and Murphy*, 304.

3. *Award—Interest—Consolidated Railway Act, 1879, (D.)—Arbitrators' fees—Summary order.*—An order was obtained for immediate possession of land under the Consolidated Railway Act, 1879, (D.), and money was paid into the Canadian Bank of Commerce under the same Act by the company.

Held, that the land-owner was entitled to interest upon the amount subsequently awarded him from the date of the award, only at the rate allowed by the bank upon a deposit and not at the legal rate of six per cent.

Re Lea, 21 C. L. J. 154, followed.

In the litigation that ensued, it was determined that neither party was entitled to the costs of arbitration under the statute; but the company, in order to take up the award, paid the whole of the arbitrators' fees.

Held, that a summary order could not be made to recoup the company for one-half the fees out of the moneys payable to the land-owner, and such order was refused without prejudice to an action for the same purpose. *Re Philbrick and Ontario and Quebec Railway Company*, 373.

4. *Award—Interest—Consolidated Railway Act, 1879, (D.)*—Money was paid into a bank under Consolidated Railway Act, 1879, (D.), sec. 9, sub-sec. 28, and an order for immediate possession of lands expropriated by the company was made by a Judge under the sub-section, and an award of compensation was made subsequently.

Held, that the land-owner was entitled to interest on the amount awarded him only at the rate allowed by the bank on the money paid in and not at the legal rate. *Re George Taylor and the Ontario and Quebec Railway Company*, 371.

RECEIVER.

See ADMINISTRATION.

REFERENCE.

See ADMISSIONS—MASTER IN ORDINARY, 2.

REFEREE (OFFICIAL.)

Single Judge in Court—Power to review findings of referee—Secs. 48

and 50, O. J. A.]—*Held*, that a single Judge, sitting as the Court, has power to review the findings of an official referee upon a reference under sec. 48, O. J. A. *Hill v. The Northern Pacific Junction Railway Company*, 103.

RETURN.

See INFANT.

SALE.

See MORTGAGE, 2—PARTITION, 1
—VENDOR AND PURCHASER, 2.

SECURITY.

See INFANT, 3.

SERVICE.

Service of papers—Toronto agent.]—Service of papers on a Toronto agent for an outside solicitor is not good unless accompanied with a statement of the name of the solicitor for whom the agent is served. *Prittie v. Lindner et al.*, 313.

See APPEARANCE—COMMITTAL —
INDORSEMENT, 1.

SET-OFF.

1. *Pleading—Claim arising since action — Set-off — Counter-claim—Striking out inapplicable defence.*]—The Judicature Act has not changed the law so as to allow of a claim arising since the commencement of the action being pleaded as a set-off,

although it may be made the subject of counter-claim.

Therefore, where a defence of money due to defendants by the plaintiffs, part of which accrued before and part after action brought, was pleaded as a set-off, the order of a local Judge directing the defendants to amend by confining their plea of set-off to those debts which accrued before the commencement of the action, was affirmed.

A defence which is wholly inapplicable may be struck out, unless amended, although it is neither scandalous nor tending to prejudice, embarrass, or delay. *Chamberlain et al. v. Chamberlin et al.*, 501.

2. *Claim and counter-claim — Cross-judgments—Set-off—Solicitors' lien.*]—The plaintiffs sued for freight for the carriage of timber, and the defendant pleaded a counter-claim for neglect and delay in the carriage of the timber.

The judgment at the trial was as follows: "The verdict will be for the plaintiffs for \$2,122, and for the defendants upon their counter-claim for \$1,420, and each party will be entitled to costs against the other, as if the statement of claim and counter-claim were separate actions, and I direct that judgment be entered accordingly."

Held, [reversing the decision of the Master in Chambers], that the judgments recovered by the plaintiffs and defendant must be treated as judgments in separate actions, and, therefore, that in setting off the judgments the claim for costs of the defendant's solicitors upon the judgment against the plaintiffs should be protected. *Canadian Pacific R. W. Co. v. Grant*, 208.

See ATTACHMENT — SOLICITOR'S LIEN, 3.

SETTLED ESTATES ACT.

See EXAMINATION, 6.

SHERIFF.

Sheriff—Poundage—Arrest.]—A sheriff upon arresting a judgment debtor under a *ca. sa.* thereby becomes at once entitled as against the execution creditor to full poundage on the amount of the execution. *McNab v. Oppenheimer*, 348.

See INTERPLEADER, 1.

SLANDER.

See PARTICULARS, 2.

SOLICITOR.

See FOREIGN COMMISSION, 2—SERVICE.

SOLICITOR AND CLIENT.

See ADMISSIONS—COSTS—VENDOR AND PURCHASER, 2.

SOLICITOR'S LIEN.

1. *Toronto agents—Lien on fund in Court.*]—The Toronto agents of a deceased solicitor were held entitled to a lien on a sum of money in Court to the credit of this matter, to which the solicitor was entitled for his costs, to the extent of their

unpaid agency bill of charges in this matter, and it was ordered that their bill should be paid out of the fund in priority to the claims of the other creditors of the solicitor. *Re Ryan*, 127.

2. *Fund in Court—Assignment—Solicitor's lien—Priorities.*]—An assignment was made by the mortgagor to a creditor of a portion of a fund in Court, as to which litigation was pending between mortgagor and mortgagee as to their respective shares.

Held, that to the extent to which the solicitors of the mortgagor incurred costs in resisting and prevailing against the accounts brought in on behalf of the mortgagee, to that extent their lien should precede the assignment. *Yemen v. Johnston*, 231.

3. *Claim and counter-claim—Cross-judgments—Set-off—Solicitor's lien.*]—Where judgments were recovered in the same action by the plaintiff on his claim with general costs of action, and the defendant on his counter-claim with costs thereof, such claim and counter-claim arising out of the same subject matter, the judgment for counter-claim largely exceeding the former in amount, a set-off was allowed of so much of the money recovered by the defendant against the plaintiff on defendant's counter-claim as would cover the costs adjudged to the plaintiff on his recovery of judgment against the defendant, notwithstanding the claim of the plaintiff's solicitors to a lien on the costs adjudged to the plaintiff.

Quære, when a judgment, as in this case has been framed without directing a set-off, whether a Judge in Chambers has power to direct it to the prejudice of the solicitor, so

as to vary the decree of the Court. *Brown v. Nelson*, 121.

See SET-OFF, 2—COSTS, 15.

SPECIAL EXAMINER.

Examination — Production of documents—Special examiner—Rule 285, O. J. A.—G. O. Chy. 147.—The powers of the special examiner under G. O. Chy. 147, as to directing the production of documents, extend to examinations under Rule 285, O. J. A.

Upon an examination of a party under Rule 285, at a stage of the action earlier than an examination will be ordered as of course, only material documents should be produced such as would be produced in the ordinary course at a later stage. *Orpen v. Kerr*, 128.

SPECIFIC PERFORMANCE.

See CAUSE OF ACTION.

STATEMENT OF CLAIM.

See WRIT OF *CAPIAS*.

STATEMENT OF DEFENCE.

Delivery of Statement of defence—Time.—A statement of defence, delivered after the proper time and on the same day on which the plaintiff set the action down to be heard on motion for judgment, was held irregular, and the Court ordered that it should be struck out, and judgment granted for the plaintiff, as prayed by the statement of claim,

unless the defendant paid the costs of setting down the action and of the motion for judgment within a limited time. *Snider v. Snider*, 34.

STATUTE OF LIMITATIONS.

See JUDGMENT, 1.

STAYING PROCEEDINGS.

1. *Cross-actions—Staying proceedings—Burden of proof—Consolidation.*—On the 4th February, 1885, The Confederation Life Association commenced an action in the Chancery Division to set aside a policy of insurance.

On the 13th May, 1885, *Miller et al.* brought an action to recover the amount of the policy, and on the 23rd May moved to stay proceedings in the former action.

Held, following the rule laid down in *Thomson v. South-Eastern R. W. Co.*, 9 Q. B. D. 320, that there is no hard and fast rule in cases of cross-actions, that the one commenced last should be stayed. The Court should take the circumstances into consideration, and exercise its discretion as to what is the fairest mode of settling the dispute, and give the conduct of the litigation to the party upon whom the substantial burden of proof rests.

On appeal, ROSE, J., declined to make any order.

Subsequently, on the 27th June, 1885, the defendants in the first action moved for a stay of proceedings in it, and the Master made an order accordingly.

On appeal, on October 12th, BOYD, C., declined to interfere at present, as the action of *Miller v.*

Confederation Life had been tried and a verdict given for the plaintiffs, but reserved leave to renew the motion if the verdict should be set aside, and varied the order of the Master by consolidating the two actions. *Miller et al. v. Confederation Life Association*.—*Confederation Life Association v. Miller et al.*, 241.

See CONTEMPT OF COURT, 3—
COSTS, 6—TRIAL, 1.

SUGGESTION.

See JUDGMENT, 1.

SURROGATE COURT.

See COSTS, 10.

TAXATION.

See APPEAL, 2, 4, 12—COSTS, 1, 7, 12, 17.

TAXING OFFICER.

See COSTS, 7—COUNSEL FEES.

THIRD PARTY.

See COSTS, 3, 5.

TIME.

See APPEAL, 1, 3, 4, 7, 8, 10, 11—
COSTS, 17—JUDGMENT, 3—STATE-
MENT OF DEFENCE.

TRIAL.

1. *Staying trial—Interlocutory appeal—Supreme Court Act, 1879, sec. 9—O. J. A. sec. 43.*—The trial of the action was stayed pending an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal upon a question arising in the action as to the method of trial of the issues in this and a cross-action. *Conmee et al. v. Canadian Pacific Railway Company*, 356.

2. *Evidence—Issue of forgery—Examination of party abroad—Ex parte order.*—No order of any moment should be made *ex parte*, except in a case of emergency.

The point in dispute in the action was as to the genuineness of a document, which the plaintiff alleged to be a forgery, obtained either by imitation of his signature, or by personation.

Held, that no order should be made which would have the effect of saving the plaintiff from personal attendance at the trial, and examination before the Court and jury. *Thomas v. Storey*, 417.

See COSTS, 16—EVIDENCE—INTERPLEADER, 6—VENUE, 5.

TRUSTEE.

See EXECUTOR, 1, 3.

VAGRANT.

See CONVICTION, 2.

VENDOR AND PURCHASER.

1. *Vendor and Purchaser—Compensation—Vesting order—Advertisement—Judicial sale.*]—The advertisement of a judicial sale stated that the property was in possession of a tenant, who would permit the purchaser to obtain possession on the first of November. The purchaser, however, was prevented by the tenant from taking possession till the month of January following. About the middle of November the purchaser obtained a vesting order:

Held, that the purchaser was entitled to compensation from the vendor for being kept out of possession, and that he had not waived his right by taking a vesting order. The failure to give possession was a breach of the representation in the advertisement, a representation on account of which it was to be assumed that the purchase money was greater than it would otherwise have been. *Barber v. Barber*, 137.

2. *Sale—Vendor's solicitor—Deposit—Default—Responsibility of Vendor.*]—Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale;

Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency. *Mulkins v. Clarke*, 350.

VENUE.

1. *Cross-actions, consolidation of—Venue.*]—Where cross-actions, with different venues, are consolidated, the place of trial will be

ordered as the balance of convenience requires. *Gonee v. Leitch*, 255.

2. *Changing venue—Judge in Chambers—Judge at Assizes—Divisional Court—Convenience—Costs—O. J. A., Rule 254.*]—MR. WINCHES-TER, Official Referee, sitting for the Master in Chambers, refused an application by the defendant to change the place of trial from Sarnia to Stratford, but gave leave to bring on an appeal from his order, or a substantive motion to change the place of trial, before ARMOUR, J., at the Sarnia Assizes.

ARMOUR, J., entertained the motion, which was made according to the leave given, and made the order changing the venue to Stratford. The order was drawn up as made by a Judge at the Assizes, and was signed by the Local Registrar at Sarnia.

Held, that, having regard to Rule 254, O. J. A., and to the leave given and the character of the motion, the order of ARMOUR, J., was to be regarded as that of a Judge and not of the High Court, and could therefore be reviewed by the Divisional Court.

There is nothing to prevent a Judge sitting at the Assizes hearing a Chambers motion, if he is disposed for the purpose to treat the Court room as his Chambers.

Such an application as this, however, should not be made at the trial on account of the inconvenience and detriment to the public interest arising from the delay of other business appropriate to the Assizes, and on account of the injustice to parties to the cause who have prepared for trial; and it is too late when the Assizes have begun to consider the question of the balance of convenience; and therefore, while the Court

did not see fit under the circumstances to restore the venue to Sarnia, they varied the order of ARMOUR, J., by making the costs of the day at Sarnia, and of the several motions to change the venue costs to the plaintiff in any event. *The Sarnia Agricultural Implement Manufacturing Company v. Perdue*, 224.

3. *Local venue—Foreclosure—Possession—Ejectment—Rule 254, O. J. A.*—An action by a mortgagee for foreclosure, payment, and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254, O. J. A., and the venue need not therefore in such an action be laid in the county where the lands lie. *Seymour v. DeMarsh*, 472.

4. *Venue—Preponderance of convenience.*—In an action by a husband against his wife to enforce a charge on land, the cause of action arose at Hamilton, where also the parties and their respective solicitors and all the witnesses resided, but the plaintiff proposed to have the action tried at Toronto. The increase in expense of a trial at Toronto over one at Hamilton was estimated by the defendant at between \$50 and \$75, and by the plaintiff at about \$30.

Held, that there was an exceeding preponderance of convenience in favour of Hamilton, and it was ordered that the place of trial should be changed, unless the plaintiff at once paid into Court \$40 to meet the defendant's additional expense. *Servos v. Servos*, 135.

5. *Order made at trial—Judge in Chambers—Res judicata—Jurisdiction of Divisional Court—O. J. A. sec. 28, sub-secs. 2, 3—R. 254.*—

The action came on for trial at the Toronto Assizes, but the trial was postponed, and Armour, J., endorsed on the record: "Upon my own motion I order that the place of trial in this cause be changed to the town of Belleville, and that this cause be tried at the next Assizes there by a jury."

ROSE, J., sitting in Chambers, had previously refused to change the place of trial to Belleville.

Held, that the question of place of trial was *res judicata*.

Held, also, notwithstanding sec. 28, sub-secs. 2 and 3, O. J. A., that the Divisional Court had jurisdiction to hear an appeal from the order of Armour, J., having regard to the language of Rule 254, O. J. A., and of the order itself.

Semble, Rule 254 does not give a Judge a right to interfere with the procedure in the action, except at the instance of a party. *Bull v. The North British Canadian Loan and Investment Company (Limited) et al.*, 83.

See EJECTMENT.

WILL.

See JURY.

WITNESS.

Criminal law—Refusing to provide for wife and children—Defendant as witness—Magistrates' powers and duties—32-33 Vic. ch. 20, sec. 25 (D.)—49 Vic. ch. 51, sec. 1 (D.)—"Prosecution," meaning of in latter Act.—Under 32-33 Vic. ch. 20, sec. 25 (D.), as amended by 49 Vic. ch. 51, sec. 1. (D.), defendant was

charged by his wife, before a magistrate, with refusing to provide necessary clothing and lodging for herself and children. At the close of the case for the prosecution, defendant was tendered as a witness on his own behalf. The magistrate refused to hear his evidence, not because he was the defendant, but because he did not wish to hear evidence for the defence; and subsequently without further evidence committed him for trial.

Held, that the defendant's evidence should have been taken for the defence; that a magistrate is bound to accept such evidence in cases of this kind and give it such weight as he thinks proper, and that the exercise of his discretion to the contrary is open to review.

Held, also, that the amended section of the Act is intended to enlarge the powers and duties of magistrates in cases of this nature, and that the word "prosecution" therein includes the proceedings before magistrates as well as before a higher Court. *Regina v. Meyer*, 477.

See COSTS, 16 — EXAMINATION—TRIAL, 2.

WORDS.

"Following the event."] — See COSTS, 14.

"Order" — "Adjudge."] — See CONVICTION, 1.

"Prosecution"] — See WITNESS.

WRIT OF CAPIAS.

Capias—Judgment—Special bail—Appearance—Statement of claim—C. L. P. Act, sec. 34 (R. S. O. ch. 50, sec. 39)—O. J. A., rule 5.]—

The plaintiffs issued a writ of capias, irregular and contradictory in its provisions. It purported to be issued in a pending action in which judgment had been recovered, and claimed the amount of the judgment and further costs. It required the defendant to put in special bail, which by its recognizance meant an undertaking by sureties to pay the condemnation money, in which the defendant "shall be condemned in this action." The claim indorsed upon the writ and the requirement as to special bail were alone applicable to a pending action on the judgment. The bail to the sheriff undertook that special bail would be put in, and special bail was put in.

Held, that the defendant and his sureties had, by putting in special bail, treated the writ as one issued in an action on the judgment, and had placed the defendant in the same position as if he had appeared in such action, and a statement of claim delivered after such an appearance was therefore regular.

Semble, section 34 of the C. L. P. Act (R. S. O. ch. 50, sec. 39) has not been repealed by rule 5, O. J. A. *Cochrane Manufacturing Company v. Lamon*, 162.

See ARREST, 1, 3—EXECUTION.

WRIT OF SUMMONS.

See INDORSEMENT.





